FILED
(1)
No. 98 906 DEC 1 - 1998
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1998

STATE OF GEORGIA, DEPARTMENT OF REVENUE,

Petitioner,

v.

GARY BURKE and PAMELA B. BURKE and
RAYMOND D. HEADRICK and
CYNTHIA J. HEADRICK,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 30, 1998

75 pp

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QUESTION PRESENTED FOR REVIEW

Whether the filing of a proof of claim in a bankruptcy case results in a waiver of a state's Eleventh Amendment immunity to allow a debtor to obtain affirmative relief against a state?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT UNDER RULE 29.4(b) 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 6

I. The Eleventh Circuit's Decision Regarding the Extent To Which a State Waives Its Eleventh Amendment Immunity When It Files a Proof of Claim Is In Conflict with Other Circuit Courts of Appeal 7

II. The Eleventh Circuit's Decision Is Not Consistent with This Court's Decision in *Gardner v. New Jersey* 12

III. The Eleventh Circuit's Decision Conflicts with This Court's Precedent Regarding Waivers of Eleventh Amendment Immunity 15

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 16

Danning v. United States, 259 F.2d 305 (9th Cir. 1958), *cert. denied*, 359 U.S. 911 (1959) 8, 9

DeKalb County Div. of Family and Child Servs. v. Platter (In re Platter), 140 F.3d 676 (7th Cir. 1998) 14

Edelman v. Jordan, 415 U.S. 651 (1973) 16

Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459 (1945) 17, 18

Gardner v. New Jersey, 329 U.S. 565 (1947) ..... *passim*

In re Creative Goldsmiths of Washington, D.C., Inc., 119 F.3d 1140 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 1517 (1998) 4, 10, 11

In re Sacred Heart Hospital of Norristown, 133 F.3d 237 (3d Cir. 1998) 4

In re Straight, 143 F.3d 1387 (10th Cir. 1998), *petition for cert. filed* (U.S. Sept. 9, 1998) (No. 98-418) 4, 10, 11

Matter of Estate of Fernandez, 123 F.3d 241 (5th Cir. 1997) 4

Moragne v. Illinois Dep't of Public Aid, 710 F.2d 1297 (7th Cir. 1983) 6, 7, 8

Murray v. Wilson Distributing Co., 213 U.S. 151 (1909) 16

Pennsylvania v. Union Gas, 491 U.S. 1 (1989) 4

Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990) 16, 17

TABLE OF AUTHORITIES – Continued

Page

Robinson v. Georgia Department of Transportation, 966 F.2d 637 (11th Cir. 1992) 15

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 3, 4, 13

State of Ohio v. Madeline Marie Nursing Homes, 694 F.2d 449 (6th Cir. 1982) 6, 8, 9

STATUTES

11 U.S.C. § 106 ..... *passim*

11 U.S.C. § 362 3

11 U.S.C. § 524 3

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2403(a) 2

28 U.S.C. § 451 2

O.C.G.A. § 48-2-9 18

CONSTITUTIONAL PROVISIONS

Amend. XI ..... *passim*

Amend. XIV, § 5 4

Ga. Const. art. I, § II, ¶ IX(e) 17

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The State of Georgia, Department of Revenue respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit (App. 1) is reported at 146 F.3d 1313. The opinion of the United States District Court for the Southern District of Georgia (App. 17) is unreported. The opinions of the United States Bankruptcy Court for the Southern District of Georgia (App. 27, 39) are reported at 203 B.R. 493 and 203 B.R. 805.

JURISDICTION

The Court of Appeals entered its judgment on July 22, 1998 (App. 1).

An order denying the petition for rehearing was entered by the Court of Appeals on September 15, 1998. (App. 51). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The notifications required by Sup. Ct. R. 29.4 have been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

11 U.S.C. § 106(b) provides:

> A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

STATEMENT UNDER RULE 29.4(b)

Because this proceeding draws into question to some extent the constitutionality of 11 U.S.C. § 106(a) and (b) and neither the United States nor any federal department, agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable and therefore this document has been served on the Solicitor General of the United States.

No Court of the United States as defined by 28 U.S.C. § 451 has, pursuant to 28 U.S.C. § 2403(a), certified to the

Attorney General the fact that the constitutionality of such Acts of Congress has been drawn into question.

STATEMENT OF THE CASE

This case presents an issue of bankruptcy court jurisdiction to hear claims asserted against states after this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). However, this case raises distinct concerns not present in many other cases. This case arises out of two bankruptcy cases in which the State of Georgia, Department of Revenue filed proofs of claim. In both cases, objections were filed by the Appellees to the claims filed by the State of Georgia. The objections were resolved either by order of the bankruptcy court or by an amendment to the proof of claim. The Appellees filed adversary proceedings against the State of Georgia alleging that the State had violated the discharge injunction of 11 U.S.C. § 524 by sending a tax collection letter (Burkes), and the automatic stay of 11 U.S.C. § 362 by issuing an official notice of assessment and demand for payment and a collection notice. (Headricks). (App. 14).

In both adversary proceedings, the Bankruptcy Court rejected Appellant's argument that 11 U.S.C. § 106 was unconstitutional and held that Congress had abrogated the states' Eleventh Amendment immunity pursuant to the Fourteenth Amendment to the United States Constitution and, alternatively that Appellant had waived its immunity by filing proofs of claim in Appellees' bankruptcy cases. (App. 27, 39). On July 23, 1997, without addressing the waiver issue, the District Court affirmed

the Bankruptcy Court on the basis that Appellant's Eleventh Amendment immunity was validly abrogated pursuant to Congress' power under § 5 of the Fourteenth Amendment. (App. 17).

The precise holding of this Court in *Seminole Tribe* is that the powers given to Congress under the Indian Commerce Clause of the United States Constitution do not include the power to abrogate Eleventh Amendment immunity. 517 U.S. at 72-73. In *Seminole Tribe*, this Court recognized that, prior to its decision, it had "found authority to abrogate [Eleventh Amendment immunity] under only two provisions of the Constitution, [the Fourteenth Amendment and the Commerce Clause]." 517 U.S. at 59. This Court went on to overrule its decision in *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), a plurality decision which had held that Congress could abrogate Eleventh Amendment immunity under its power to regulate interstate commerce. 517 U.S. at 66. Since *Seminole Tribe*, the Circuit Courts of Appeal to consider the constitutionality of the abrogation of Eleventh Amendment immunity found in the Bankruptcy Code at 11 U.S.C. § 106(a) have uniformly concluded it to be unconstitutional. *In re Sacred Heart Hospital of Norristown*, 133 F.3d 237, 243 (3d Cir. 1998); *Matter of Estate of Fernandez*, 123 F.3d 241, 244 (5th Cir. 1997); *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1145-1146 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 1517 (1998). There is a split of authority among the Circuit Courts regarding the constitutionality of 11 U.S.C. § 106(b) which purports to define the effect of the filing of a proof of claim on a governmental entity's immunity from suit. *Creative Goldsmiths*, 119 F.3d at 1147; *In re Straight*, 143 F.3d 1387, 1392 (10th

Cir. 1998), *petition for cert. filed* (U.S. Sept. 9, 1998) (No. 98-418).

The State of Georgia appealed the decision of the District Court to the Eleventh Circuit Court of Appeals. On July 22, 1998, the Eleventh Circuit issued its decision affirming the decision of the Southern District of Georgia. (App. 1). The Eleventh Circuit did not reach the issue of the constitutionality of 11 U.S.C. § 106(a) or (b). (App. 8-9). Instead, the Eleventh Circuit concluded that by filing proofs of claim in Appellees' bankruptcy cases, the State of Georgia waived its Eleventh Amendment immunity to the extent of being subject to suit for damages in the form of costs and attorneys' fees for alleged violations of the automatic stay and discharge injunction. (App. 15-16).

While the constitutionality of 11 U.S.C. § 106(a) is addressed in the lower courts' decisions in this case, the Eleventh Circuit did not reach the issue. (App. 17, 27, 39). Instead, the Eleventh Circuit, relying in large part on this Court's decision in *Gardner v. New Jersey*, 329 U.S. 565 (1947), concluded that the State of Georgia has waived its Eleventh Amendment immunity. (App. 15-16).

This Court's decision in *Gardner v. New Jersey*, 329 U.S 565 (1947), held that where a state files a proof of claim in a bankruptcy case, there is no immunity bar to the bankruptcy court hearing objections to the proof of claim. 329 U.S. at 573-74. The State of Georgia filed a Petition for Rehearing which the Eleventh Circuit denied on September 15, 1998. (App. 51).

REASONS FOR GRANTING THE PETITION

Consideration of this case by this Court is necessary to resolve a conflict among the Circuit Courts of Appeal. The State of Georgia and other states regularly file proofs of claim for taxes and other liabilities in bankruptcy cases. Objections to those proofs of claim are regularly heard and decided by the bankruptcy courts. In *Gardner*, this Court held that the immunity of the states from suit in federal court does not bar bankruptcy courts from entertaining objections to proofs of claims filed by the states. 329 U.S. 565. The *Gardner* decision does not indicate that the filing of a proof of claim results in a waiver of states' immunity to the extent of permitting affirmative recovery against states. In fact, *Gardner* expressly recognizes that when an objection to claim is filed, "[n]o judgment is sought against the State." 329 U.S. at 573-74. *Gardner* has been interpreted by two Circuit Courts as not providing for affirmative relief against states. *State of Ohio v. Madeline Marie Nursing Homes*, 694 F.2d 449 (6th Cir. 1982); *Moragne v. Illinois Dep't of Public Aid*, 710 F.2d 1297 (7th Cir. 1983). However, the Eleventh Circuit held in this case that by filing proofs of claim, the State of Georgia waived its Eleventh Amendment immunity to the extent of permitting affirmative relief in the form of costs and attorneys' fees in suits against the State. (App. 15-16). The Tenth Circuit has reached a similar conclusion, relying in part on 11 U.S.C. § 106 (b). *Straight*, 143 F.3d 1387. The Eleventh Circuit recognized that no waiver under Georgia law has been shown, but still concluded that a waiver permitting affirmative relief existed. (App. 10). This case presents this Court with the opportunity to

reconcile a clear conflict among the Circuit Courts. Therefore, this petition should be granted.

I. The Eleventh Circuit's Decision Regarding the Extent To Which A State Waives Its Eleventh Amendment Immunity When It Files A Proof Of Claim Is In Conflict With Other Circuit Courts of Appeal

The Eleventh Circuit Court of Appeals held that by filing proofs of claim in the Appellees' underlying bankruptcy cases, "the State of Georgia has waived its Eleventh Amendment immunity to the extent of attorneys' fees and costs incurred by the debtors in enforcing the bankruptcy court's automatic stay and discharge injunction." (App. 15-16). Thus, under the Eleventh Circuit's decision, not only does the bankruptcy court have jurisdiction over the determination of the State's proofs of claim as contemplated in *Gardner*, but the bankruptcy court also has jurisdiction over adversary proceedings filed by debtors against the State and can award an affirmative recovery of monetary relief against the State in the form of costs and attorneys' fees. This conclusion conflicts with the decisions of other Circuit Courts of Appeal and extends the bounds of this Court's decision in *Gardner*.

The Eleventh Circuit's decision in this case conflicts with a decision of the Seventh Circuit Court of Appeals in *Moragne v. Illinois Dep't of Public Aid* which held that a state does not waive its sovereign immunity defense to actions for affirmative relief whenever it files a proof of claim. 710 F.2d 1297. There, the debtors in bankruptcy filed a complaint against the Illinois Department of Public

Aid seeking to obtain monetary recovery. 710 F.2d at 1299. The Seventh Circuit Court of Appeals recognized that "the appellants are suing the state and, if they were to prevail, would obtain money out of the public treasury of Illinois." 710 F.2d at 1301. The Seventh Circuit interpreted *Gardner* as holding that "where the state had filed the claim and where no one was seeking money from the state, there was no sovereign immunity problem." 710 F.2d at 1300. The Seventh Circuit stated that "the limited waiver of sovereign immunity created by the filing of the claim extends only so far as necessary to adjudicate that claim, such as considering the objections of other parties to the claim," and concluded that the Eleventh Amendment barred affirmative recovery from the State of Illinois. 710 F.2d at 1301.

The Eleventh Circuit's decision in this case also conflicts with a decision of the Sixth Circuit Court of Appeals in *State of Ohio v. Madeline Marie Nursing Homes*, which held that, although the State filed a proof of claim, affirmative relief against the State was barred. 694 F.2d 449. In determining the effect of filing a proof of claim on the State's Eleventh Amendment immunity, the Sixth Circuit stated that " 'affirmative recovery against the sovereign is not a corollary of the sovereign's right to sue or present a claim for bankruptcy adjudication.' " 694 F.2d at 462 (quoting *Danning v. United States*, 259 F.2d 305, 310 (9th Cir. 1958), *cert. denied*, 359 U.S. 911 (1959)).[1] The Sixth

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[1] In the *Danning* decision quoted by the Sixth Circuit, the Ninth Circuit held that where the United States filed a proof of claim, objections to the claim could be entertained, but the United States did not waive its sovereign immunity to the extent

Circuit concluded that the act of filing a proof of claim did not waive Ohio's Eleventh Amendment immunity to permit the bankruptcy court to hear claims unrelated to the proof of claim. 694 F.2d at 462.

The confusion regarding the effect of filing a bankruptcy proof of claim by a state is apparent in other decisions of the Circuit Courts of Appeal. Section 106(b) of the Bankruptcy Code provides that there is a "deemed waiver" of immunity when a state which files a proof of claim regarding claims against the state that arose out of the same transaction or occurrence. 11 U.S.C. § 106(b) provides:

> A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

In the instant case, the Eleventh Circuit "declined to rely on 11 U.S.C. § 106(b)" because it assumed for purposes of this case that Eleventh Amendment immunity has not been validly abrogated in the Bankruptcy Code. 146 F.3d at 1317 n.8. Nevertheless, the Eleventh Circuit Court's analysis appears to use the test of § 106(b) which it

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of permitting affirmative relief. 259 F.2d at 309-10. The *Danning* decision specifically notes that *Gardner* recognizes that sovereign immunity does not bar objections to proofs of claim filed by governmental entities. 259 F.2d at 310.

indicated "may be a correct restatement of the jurisprudence regarding waiver of Eleventh Amendment Immunity." *Id.*

In *In re Creative Goldsmiths*, the Fourth Circuit rejected the "deemed waiver" of 11 U.S.C. § 106(b) as an unconstitutional attempt to abrogate the states' immunity from suit. 119 F.3d at 1147.

> While 11 U.S.C. § 106(b) may correctly describe those actions that, as a matter of constitutional law, constitute a state's waiver of the Eleventh Amendment, it is nevertheless not within Congress' power to abrogate such immunity by "deeming" a waiver. Rather, in the absence of a constitutional authorization, it lies solely within a state's sovereign power to waive its immunity voluntarily and to consent to federal jurisdiction. Only if it waives such immunity may a private citizen sue the state in federal court.

Id.

In contrast, the Tenth Circuit Court of Appeals found that 11 U.S.C. § 106(b) merely restates this Court's holding in *Gardner* and relied on § 106(b) in concluding that where one agency of a state filed a proof of claim, that agency waived Eleventh Amendment immunity as to all agencies of the State. *Straight*, 143 F.3d at 1392. The Tenth Circuit found that:

> § 106(b) does not pretend to abrogate a state's immunity, it merely codifies an existing equitable circumstance under which a state can choose to preserve its immunity by not participating in a bankruptcy proceeding or to partially waive that immunity by filing a proof of claim. The choice is left to the state. Thus,

> § 106(b) follows the lead already established by the Supreme Court in *Gardner v. New Jersey*.

Id.

There is a clear divergence of opinion among the circuits regarding whether and to what extent a state waives its immunity when it files a proof of claim. The Eleventh, Fourth and Tenth Circuits, to varying degrees, have held that affirmative relief may be obtained against a State that files a proof of claim in a bankruptcy case. The Eleventh Circuit concluded in this case that the filing of a proof of claim results in a waiver "to the extent of the attorneys' fees and costs incurred by the debtors in enforcing the bankruptcy court's automatic stay and discharge injunction." (App. 15-16). The Fourth Circuit concluded that the waiver resulting from filing a proof of claim extends to compulsory counterclaims to the proof of claim, but did not extend to claims related to taxes other than those included on the proof of claim. *Creative Goldsmiths*, 119 F.3d at 1149. The Tenth Circuit concluded that the filing of a proof of claim by one state entity resulted in a total waiver of the state's Eleventh Amendment immunity. *Straight*, 143 F.3d at 1392. In conflict with these decisions are the previously discussed decisions of the Sixth and Seventh Circuit holding that the filing of a proof of claim does not waive Eleventh Amendment immunity to the extent of allowing affirmative relief against a state.

The conflict of opinion among the Circuits illustrates the need for guidance from this Court regarding the effect of filing a proof of claim on Eleventh Amendment immunity in bankruptcy cases. This case presents this Court with a clear opportunity to resolve the conflict.

II. The Eleventh Circuit's Decision Is Not Consistent With This Court's Decision in *Gardner v. New Jersey*

In *Gardner v. New Jersey*, 329 U.S. 565 (1947), the State of New Jersey filed a tax claim in the bankruptcy case of the Central Railroad Company of New Jersey to which the bankruptcy trustee and the debtor objected. The trustee petitioned the bankruptcy court to adjudicate the tax claim. The bankruptcy court allowed certain defenses to be asserted over New Jersey's objections, and New Jersey appealed. This Court upheld the bankruptcy court's authority to determine the claim.

> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide by the consequence of that procedure. If the claimant is a State, the procedure of proof and allowance is not transmuted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. The whole process of proof, allowance and distribution is, shortly speaking, an adjudication of interests claimed in a res. It is none the less such because the claim is rejected in toto, reduced in part, given a priority inferior to that claimed, or satisfied in some way other than payment in cash. When the State becomes the actor and files a claim against the fund it waives any immunity which it otherwise might have had respecting adjudication of that claim.

329 U.S. at 573-74. This Court held that when a state files a claim in a bankruptcy case, it waives any immunity it may have respecting adjudication of that claim. 329 U.S.

at 574. This Court's reasoning emphasizes that "no judgment is sought against the state" simply because an objection to the allowance of the claim is heard. *Id.* Contrary to the Eleventh Circuit Court of Appeal's holding in this case, *Gardner* does not hold that the claims process includes separate suits for affirmative relief against a state. *Gardner* does not hold that "debtors' actions for violation of the automatic stay and discharge injunction 'arise out of the same transaction or occurrence' as the State's proof of claim." (App. 15-16). As made clear in a footnote to the decision in *Seminole Tribe of Florida v. Florida*, this Court has never awarded relief against a state under the Bankruptcy Code. 517 U.S. at 72-73.

> . . . contrary to the implication of Justice STEVENS' conclusion, it has not been widely thought that the federal antitrust, bankruptcy, or copyright statutes abrogated the States' sovereign immunity. This Court never has awarded relief against a State under any of those statutory schemes. . . . Although the copyright and bankruptcy laws have existed practically since our nation's inception, and the antitrust laws have been in force for over a century, there is no established tradition in the lower federal courts of allowing enforcement of those statutes against the States.

Id.

The adversary proceedings here are separate suits, commenced against the State of Georgia, seeking affirmative relief from the State. *Gardner*, on the other hand, involved only an objection to a proof of claim filed by a State. 329 U.S. at 570. In this case, the adversary proceedings were filed after the conclusion of the claims process.

These adversary proceedings do not seek to reclassify or reduce the claims of the State of Georgia. Since the process of claim allowance as contemplated by *Gardner* was completed, the State of Georgia contends that any further action against it is barred by the Eleventh Amendment. The adversary proceedings have nothing to do with the process of claim allowance and disallowance as contemplated by *Gardner* but rather are independent suits to obtain affirmative monetary recovery in the form of damages, costs and attorneys' fees against the State of Georgia. As such, the Appellees' suits are outside the limited waiver recognized in *Gardner.*

The Seventh Circuit Court of Appeals recently recognized that, in *Gardner,* "[t]he Supreme Court held that no sovereign immunity problem existed where the state filed the claim and where no one sought money from the state, reasoning that '[i]t is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide by the consequences of that procedure.' " *DeKalb County Div. of Family and Child Servs. v. Platter (In re Platter),* 140 F.3d 676, 679 (7th Cir. 1998). As *Gardner* did not involve a suit against a state, but an objection to a state's claim, it seems clear that the state's Eleventh Amendment immunity would not be implicated. The Courts of Appeal decisions conflict and the Eleventh Circuit's decision in this case misconstrues *Gardner* as providing for a waiver of Eleventh Amendment immunity with respect to independent lawsuits seeking affirmative recovery from the State of Georgia. The Eleventh Circuit's decision went well beyond this Court's decision in *Gardner* and presents

an important question of federal jurisdiction that should be reviewed by this Court.

III. The Eleventh Circuit's Decision Conflicts With this Court's Precedent Regarding Waivers of Eleventh Amendment Immunity

In concluding that by filing a proof of claim in underlying bankruptcy cases the State of Georgia has waived its Eleventh Amendment immunity, the Eleventh Circuit did not follow this Court's precedent. The Eleventh Circuit expressly failed to find any provision of Georgia law that waives the State of Georgia's Eleventh Amendment immunity and stated that

> [s]ubsection (f) of article I, section 2, paragraph 9 of the Georgia Constitution clearly provides that the constitution's limited waiver of sovereign immunity does not include the State's Eleventh Amendment immunity, and the debtors have identified no legislation providing that the State has waived its Eleventh Amendment immunity for violations of a bankruptcy court's discharge injunction or automatic stay.

146 F.3d at 1318. *Accord Robinson v. Georgia Department of Transportation*, 966 F.2d 637, 640 (11th Cir. 1992). In doing so, the Eleventh Circuit did not follow this Court's precedent which holds that the issue of waiver of Eleventh Amendment immunity is one of state law and the state's waiver must be unequivocal.

> A State may effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular

> federal program. In each of these situations, we require an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment.

Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238 n.1 (1985). "[I]n order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in federal court." 473 U.S. at 241. In *Edelman v. Jordan*, this Court rejected the argument that by participating in a federal aid program, the State of Illinois waived its Eleventh Amendment immunity. 415 U.S. 651, 673 (1973). In doing so, this Court stated that:

> In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'

415 U.S. at 673 (quoting *Murray v. Wilson Distributing Co.*, 213 U.S. 151, 171 (1909)).

This Court has continued to follow the reasoning of the *Atascadero State Hospital* decision. In *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990), this Court interpreted the laws of New York and New Jersey and determined that those States have waived Eleventh Amendment immunity. 495 U.S. at 307-09. Before determining that a waiver existed, this Court indicated that it:

> . . . will give effect to a State's waiver of Eleventh Amendment immunity " 'only where

> stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction."

495 U.S. at 299 (quoting *Atascadero and Edelman*).

The issue of whether a particular state official has the authority to waive a State's immunity from suit in federal court is an issue to be decided under state law. *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 467 (1945). In Georgia, sovereign immunity may only be waived by the Georgia General Assembly. Ga. Const. art. I, § II, ¶ IX(e). In interpreting a similar provision in the Indiana Constitution, this Court stated that:

> Since the state legislature may waive state immunity only by general law, *it is not to be presumed in the absence of clear language to the contrary, that they conferred on administrative or executive officers discretionary power to grant or withhold consent in individual cases.*

323 U.S. at 468 (emphasis added). In that case, the State of Indiana appeared in both the Federal District Court and the Circuit Court of Appeals and defended the suit on the merits before finally raising the Eleventh Amendment before this Court. 323 U.S. at 467. This Court analyzed Indiana law to determine if an authorization for waiver of Eleventh Amendment was authorized "in its Constitution, statutes and decisions." *Id.* This Court concluded that waivers of Indiana's sovereign immunity only applied in state court and the state did not waive Eleventh Amendment immunity in federal courts. This Court also concluded that administrative and executive officers of the State of Indiana did not have the power under state

law to waive Eleventh Amendment immunity and, therefore, the suit should be dismissed. 323 U.S. at 469-70.

There is no question that the Georgia Revenue Commissioner had the power to file the proofs of claim that were filed in the instant case. O.C.G.A. § 48-2-9. However, it is equally clear that the Georgia Revenue Commissioner does not have the power to waive the State of Georgia's Eleventh Amendment immunity. Neither the Eleventh Circuit nor Appellees cited any provision of Georgia law showing that the State of Georgia's Eleventh Amendment immunity has been waived. (App. 10). Where no such waiver exists, a suit against the State is barred by the Eleventh Amendment.

In concluding that the State of Georgia has waived its Eleventh Amendment immunity without conducting an analysis of Georgia law, the Eleventh Circuit is clearly in conflict with this Court's decisions regarding waiver of Eleventh Amendment immunity. A review by this Court of this important question of the extent of federal bankruptcy court jurisdiction in relation to the states' Eleventh Amendment immunity is necessary to bring certainty and uniformity to the decisions of the courts below.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests that the Court grant a writ of certiorari.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-8917

D. C. Docket Nos. 92-11482JSD (97-42),
94-12007JSD (97-43)

IN RE: GARY BURKE, PAMELA BURKE,

Debors [sic],

STATE OF GEORGIA DEPARTMENT OF REVENUE,
Plaintiff-Appellant,

versus

GARY BURKE;
PAMELA BURKE,

Defendants-Appellees.

IN RE; RAYMOND D. HEADRICK, CYNTHIA J. HEADRICK,

Debtors,

THE STATE OF GEORGIA,
Department of Revenue,

Plaintiff-Appellant,

versus

RAYMOND D. HEADRICK;
CYNTHIA J. HEADRICK,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

(July 22, 1998)

Before ANDERSON and BIRCH, Circuit Judges, and COHILL*, Senior District Judge.

ANDERSON, Circuit Judge:

In this consolidated appeal of two separate bankruptcy proceedings, the State of Georgia Department of Revenue ("the State") appeals the district court's affirmance of two bankruptcy court orders denying the State's motion to dismiss and motion for summary judgment based on Eleventh Amendment immunity. Because we conclude that the State waived its Eleventh Amendment immunity by filing a proof of claim in each of the bankruptcy proceedings, we affirm.

I. FACTS AND PROCEDURAL HISTORY

The first bankruptcy case involves Gary and Pamela B. Burke ("the Burkes"). In August 1992, the Burkes sought relief under Chapter 13 of the Bankruptcy Code. The Georgia Department of Revenue filed a proof of claim that included an unsecured priority claim of $12,437.40 for unpaid state income taxes covering the tax years 1980-84. This claim was later adjudged to be a general unsecured claim. After the case was converted to Chapter 7, the bankruptcy court entered a general discharge order releasing the Burkes from liability for all dischargeable debts. Before the case was closed, however,

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* Honorable Maurice B. Cohill, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

neither party requested that the bankruptcy court determine whether the taxes accrued in 1980-84 were discharged. In May 1994, three months after the entry of the discharge, the Department of Revenue wrote a letter to the Burkes demanding payment of these taxes and warning that nonpayment could result in collection by garnishment, attachment, or levy. The Burkes then reopened their Chapter 7 case and filed an adversary action against the State of Georgia, alleging that the Department of Revenue violated the discharge injunction of 11 U.S.C. § 524(a) by sending the demand letter for unpaid state income taxes.[1] After its motion for summary judgment was denied,[2] the State moved to dismiss the Burkes' action, relying on *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114 (1996), and arguing that the relief sought by the Burkes was barred by the Eleventh Amendment. The bankruptcy court initially declined to address this issue, relying instead on its finding that the State of Georgia had waived its sovereign immunity by filing a

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[1] Section 524(a) provides in relevant part that "[a] discharge in a case under this title . . . (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." 11 U.S.C. § 524(a) (1993).

[2] In its motion for summary judgment, the State argued that it could not have violated the discharge injunction since the taxes in question were nondischargeable. In an August 9, 1995, order, the bankruptcy court denied this motion, finding that the 1980-84 taxes including accrued interest and penalties were discharged by the discharge order of February 1, 1994. *See In re Burke*, 200 B.R. 282, 284 (Bankr.S.D.Ga.1996). This ruling is not challenged on appeal.

proof of claim against the Burkes' bankruptcy estate. *See In re Burke*, 200 B.R. 282, 287-88 (Bankr.S.D.Ga.1996). In denying the State's motion to alter or amend the previous order, the bankruptcy court concluded that § 106(a)[3] of the Bankruptcy Code unequivocally expressed congressional intent to abrogate states' sovereign immunity for violations of the discharge injunction of § 524 and that § 106(a) was enacted by a valid exercise of power under the Fourteenth Amendment. *See In re Burke*, 203 B.R. 493, 497 (Bankr.S.D.Ga.1996) (reasoning that in light of *Seminole Tribe*, the Bankruptcy Clause of Article I did not empower Congress to abrogate the Eleventh Amendment, but that abrogation could be accomplished under the Fourteenth Amendment). In an alternative holding, the bankruptcy court concluded that even if the State of Georgia was immune from suit for its alleged violations of the discharge injunction, it had waived that immunity

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[3] Section 106(a), entitled "Waiver of Sovereign Immunity," provides:

> Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Sections . . . 362, . . . 524. . . .
>
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
>
> (3) The court may issue against a governmental unit an order, process or judgment under such sections . . . including an order or judgment awarding a money recovery, but not including an award of punitive damages.

11 U.S.C. § 106(a) (Supp.1998).

by filing a proof of claim against the Burkes. *In re Burke*, 203 B.R. at 497-98.

In the second bankruptcy proceeding, Raymond D. and Cynthia J. Headrick ("the Headricks") filed a petition for relief under Chapter 13 of the Bankruptcy Code in December 1994. The Georgia Department of Revenue filed a proof of claim for state income taxes. Thereafter, in October 1995, the Department of Revenue issued an "Official Assessment and Demand for Payment" against the Headricks, and then issued a "Collection Notice" demanding immediate payment of the taxes and warning that nonpayment would result in collection by levy, garnishment, or attachment. Subsequently, the Headricks filed an adversary action against the State of Georgia, alleging that the State's collection attempts violated the automatic stay prescribed by 11 U.S.C. § 362.[4] The State

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[4] Section 362(a) provides in relevant part that

> [e]xcept as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, . . . operates as a stay, applicable to all entities, of (1) the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; . . . (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(a) (1993).

Section 362(h) provides that "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees." 11 U.S.C. § 362(h) (1993).

moved for summary judgment, arguing that it was entitled to sovereign immunity and, alternatively, that as a matter of law it had not violated the automatic stay. The bankruptcy court found both grounds to be without merit and denied the motion. *See In re Headrick*, 200 B.R. 963, 965-69 (Bankr.S.D.Ga.1996) (adopting the same reasoning as in *In re Burke*, and thus finding that the State's immunity was abrogated because § 106(a) was enacted by Congress pursuant to a valid exercise of authority under the Fourteenth Amendment, or alternatively, that the State waived its immunity by filing a proof of claim against the debtors). The State's motion to alter or amend the previous order denying summary judgment was denied. *See In re Headrick*, 203 B.R. 805 (Bankr.S.D.Ga. 1996). The State of Georgia then appealed the bankruptcy court's orders in *In re Burke* and *In re Headrick* to the District Court for the Southern District of Georgia. In affirming the bankruptcy court's orders, the district court concluded that "the case law now uniformly acknowledges that Congress did not have the power to enact § 106(a) pursuant to those powers granted it under the Bankruptcy Clause of Article I," but that § 106(a) validly abrogates Georgia's sovereign immunity because "the bankruptcy code creates privileges and immunities enforceable by Congress under § 5 of the Fourteenth Amendment." District Court Order, at 6-8 (July 23, 1997).[5] The State of Georgia appeals this order.

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[5] The district court acknowledged that the issue of waiver was raised by the debtors, but declined to address the issue because the court concluded that the State's Eleventh Amendment immunity was validly abrogated by 11 U.S.C. § 106(a). District Court Order, at 2 (July 23, 1997).

II. DISCUSSION

Our jurisdiction in this case arises from the district court's denial of the State of Georgia's claim to Eleventh Amendment immunity; such a denial grants the State the right of an immediate, interlocutory appeal. *See Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147, 113 S.Ct. 684, 689 (1993) (applying collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221 (1949)); *see also Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1021 (11th Cir.1994); *aff'd*, 517 U.S. 44, 116 S.Ct. 1114 (1996). The grant or denial of a state's sovereign immunity defense is an issue of law subject to *de novo* review by this court. *See Seminole Tribe*, 11 F.3d at 1021.

The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. Although the Eleventh Amendment only expressly prohibits suits against states by citizens of other states, the Supreme Court has long held that the Eleventh Amendment also bars suits brought against a state by its own citizens. *Hans v. Louisiana*, 134 U.S. 1, 15, 10 S.Ct. 504, 507 (1890). However, there are certain well-established exceptions to Eleventh Amendment immunity. First, a state may waive its Eleventh Amendment immunity and consent to suit in federal court. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 105 S.Ct. 3142, 3145 (1985). Second, Congress can abrogate

states' Eleventh Amendment immunity if Congress unequivocally expresses an intent to abrogate state immunity and acts pursuant to a valid exercise of power. *See Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 425-26 (1985) (citing *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99, 104 S.Ct. 900, 907 (1984)).

Relying on *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114 (1996), the State of Georgia contends that Congress' power to abrogate states' Eleventh Amendment immunity only exists under § 5 of the Fourteenth Amendment and that § 106(a) of the Bankruptcy Code was not enacted pursuant to the Fourteenth Amendment. The debtors[6] respond that § 106(a) validly abrogates states' sovereign immunity because § 106(a) was enacted pursuant to § 5 of the Fourteenth Amendment in order to enforce a protected due process property interest or the privileges and immunities of federal citizenship as recognized in § 1 of the Fourteenth Amendment.[7] However, we need not resolve this abrogation issue because assuming arguendo that the State of Georgia has Eleventh Amendment immunity and it has not been validly abrogated by § 106(a), we conclude that in this case the State waived its sovereign immunity by

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[6] We refer to the Burkes and the Headricks collectively as "the debtors."

[7] The amicus curiae, the Business Bankruptcy Law Committee of the New York County Lawyers' Association, contends that Congress has the right to abrogate states' Eleventh Amendment immunity pursuant to the power granted in the Bankruptcy Clause of Article I of the U.S. Constitution. As noted in the text, we need not address the abrogation issue.

filing a proof of claim in the debtors' bankruptcy proceedings.

Waiver of Eleventh Amendment Immunity[8]

The State of Georgia contends that, under its constitution, only the Georgia General Assembly may waive the

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[8] We note at the outset of this section that our waiver analysis is not based on 11 U.S.C. § 106(b). Section 106(b) provides that

> [a] governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of same transaction or occurrence out of which the claim of such governmental unit arose.

11 U.S.C. § 106(b) (Supp.1998). We decline to rely on § 106(b) because, in deciding the instant case, we have assumed arguendo that the State of Georgia's Eleventh Amendment immunity has not been validly abrogated by § 106(a) and because we acknowledge that "the power to define waiver can become the functional equivalent of the power to abrogate." *AER-Aerotron v. Texas Dep't of Transp.*, 104 F.3d 677, 681 (4th Cir.1997); *see also Schlossberg v. Maryland Comptroller of the Treasury (In re Creative Goldsmiths of Washington, D.C., Inc.)*, 119 F.3d 1140, 1147 (4th Cir.1997) (concluding that the language of § 106(b) "amounts to language of abrogation" and that it is "not within Congress' power to abrogate such immunity by 'deeming' a waiver"), *cert. denied*, 118 S.Ct. 1517 (1998). However, we note that, although we do not rely on § 106(b) and it does not control our analysis, the language of § 106(b) may well be a correct restatement of the jurisprudence regarding waiver of Eleventh Amendment immunity. *See Wyoming Dep't of Transp. v. Straight (In re Straight)*, 143 F.3d 1387 (10th Cir.1998) (concluding that § 106(b) "follows the lead already established by the *Supreme Court in Gardner v. New Jersey*" and "merely codifies an existing equitable circumstance under which a state

State's sovereign immunity, and that waiver is limited to the extent provided in the Georgia Constitution.[9] Subsection (f) of article I, section 2, paragraph 9 of the Georgia Constitution clearly provides that the constitution's limited waiver of sovereign immunity does not include the State's Eleventh Amendment immunity, and the debtors have identified no legislation providing that the State has waived its Eleventh Amendment immunity for violations of a bankruptcy court's discharge injunction or automatic stay. However, in the absence of explicit consent by state statute or constitutional provision, a

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can choose to preserve its immunity by not participating in a bankruptcy proceeding or to partially waive that immunity by filing a claim"); *In re Creative Goldsmiths*, 119 F.3d at 1147 (acknowledging that § 106(b) "may correctly describe those actions that, as a matter of constitutional law, constitute a state's waiver of the Eleventh Amendment"); *AER-Aerotron*, 104 F.3d at 683 (Niemeyer, J., concurring) (concluding that although § 106 "may restate the law of Eleventh Amendment waiver, it does not establish the law on the subject").

[9] The Georgia Constitution provides in relevant part that:

> (e) Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.
>
> (f) No waiver of sovereign immunity under this Paragraph shall be construed as a waiver of any immunity provided to the state or its departments, agencies, officers, or employees by the United States Constitution.

Ga. Const. Art. I., § II, Para. IX (Supp.1997).

state may consent to a federal court's jurisdiction through its affirmative conduct. *See Gardner v. New Jersey*, 329 U.S. 565, 573-74, 67 S.Ct. 467, 472 (1947); *Schlossberg v. Maryland Comptroller of the Treasury (In re Creative Goldsmiths of Washington, D.C., Inc.)*, 119 F.3d 1140, 1148-49 (4th Cir.1997), *cert. denied*, 118 S.Ct. 1517 (1998).[10]

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[10] In *In re Creative Goldsmiths*, 119 F.3d at 1148-49, the court analyzed Maryland constitutional and statutory law and concluded that Maryland law did not indicate a waiver of the state's Eleventh Amendment immunity nor grant the Maryland Attorney General the power to waive that immunity by defending a case on the merits. However, after undertaking this analysis, the court separately considered whether the state's filing of a proof of claim in the debtor's bankruptcy proceeding constituted consent to the trustee in bankruptcy's suit in federal court seeking to recover income taxes paid to the state. *Id.* at 1149. The court reasoned that if the state official has authority under state law to file a proof of claim in the debtor's bankruptcy proceeding and thus initiate a federal action, then the court would "look to federal law to determine the scope of waiver attending the state's federal suit." *Id.* at 1148. The court explained that

> The Eleventh Amendment . . . presents no bar to a state affirmatively entering a federal forum voluntarily to pursue its own interest. But it would violate the fundamental fairness of judicial process to allow a state to proceed in federal court and at the same time strip the defendant of valid defenses because they might be construed to be affirmative claims *against* the state. . . . For this reason, we hold that to the extent a defendant's assertions in a state-instituted federal action, including those made with regard to a state-filed proof of claim in a bankruptcy action, amount to a *compulsory* counterclaim, a state has waived any Eleventh Amendment immunity against that counterclaim in order to avail itself of the federal forum.

In *Gardner v. New Jersey*, 329 U.S. 565, 67 S.Ct. 467 (1947), the Supreme Court addressed the effect of filing a proof of claim in a bankruptcy proceeding on a state's assertion of Eleventh Amendment immunity. In that case, the State of New Jersey filed a proof of claim for unpaid taxes against the debtor. *Id.* at 570, 67 S.Ct. at 470. After the debtor and various creditors filed objections to the state's claim, the trustee in bankruptcy filed a petition for adjudication of the conflicting claims with the bankruptcy court. *Id.* at 571, 67 S.Ct. at 470. The Attorney General of New Jersey thereupon entered a special appearance in the proceedings, contending that the petition "would constitute a prohibited suit against the State." *Id.* In rejecting New Jersey's sovereign immunity argument, the Court concluded that

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Id. Applying these principles, the court concluded that the trustee's adversary action against the State of Maryland to avoid the payment of the debtor's *corporate* income taxes did not "arise out of the same transaction or occurrence supporting Maryland's proof of claim for *unrelated* [sales and withholding] taxes" and thus the trustee's action could not be "construed under federal law as a claim in the nature of a compulsory counterclaim to the state's proof of claim." *Id.* at 1149 (emphasis added). Therefore, the court held that it did not have authority to entertain the action by the trustee. *Id.* at 1150.

Unlike in *In re Creative Goldsmiths*, the debtors' adversary action in the instant case involves the same state income taxes that the State of Georgia sought to recover by filing proofs of claim in the debtors' respective bankruptcy proceedings. Therefore, we conclude that the debtors' actions for violation of the automatic stay and discharge injunction "arise out of the same transaction or occurrence" as the State's proofs of claim. *See, e.g., In re Price*, 42 F.3d 1068, 1073-74 (7th Cir.1994); *In re Pinkstaff*, 974 F.2d 113, 115 (9th Cir.1992).

> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. If the claimant is a State, the procedure of proof and allowance is not transmitted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. . . . When the State becomes the actor and files a claim against the fund it waives any immunity which it otherwise might have had respecting the adjudication of the claim.

Id. at 573-74, 67 S.Ct. at 472 (citation omitted). *See New York v. Irving Trust Co.*, 288 U.S. 329, 332, 53 S.Ct. 389, 391 (1933) (concluding that "[i]f a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible"); *see also Clark v. Barnard*, 108 U.S. 436, 447-48, 2 S.Ct. 878, 883 (1883) (holding that the State of Rhode Island had waived its sovereign immunity by voluntarily intervening as a claimant to a bankruptcy fund paid into federal court).[11]

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[11] In a recent decision, the Fifth Circuit Court of Appeals concluded that *Seminole Tribe* "does not and should not impair [the] force" of *Gardner and Irving Trust. Texas v. Walker*, 142 F.3d 813 (5th Cir.1998) (relying on *Gardner* and *Irving Trust* in holding that, although the state did not file a proof of claim in the debtor's bankruptcy proceeding, the debtor could raise discharge as an affirmative defense against the state's suit on the debt).

We conclude that the Court's reasoning in *Gardner* applies to the instant cases. *See Dekalb County Div. of Family and Child Servs. v. Platter (In re Platter)*, 140 F.3d 676 (7th Cir.1998) (applying *Gardner* and rejecting the State of Indiana's Eleventh Amendment immunity defense because a state agency had initiated an adversary proceeding in bankruptcy court against the debtor seeking a ruling that the debt owed to the agency was non-dischargeable). In *In re Headrick*, the State of Georgia invoked the aid of the bankruptcy court by filing a proof of claim for unpaid state income taxes in the Headricks' bankruptcy proceeding. However, after the bankruptcy court entered an automatic stay order in the case to prevent creditors from attempting to collect on the Headricks' debts, the State sent a collection notice and official assessment to the Headricks. We conclude that the substance of the Headricks' action is a motion to enforce the bankruptcy court's automatic stay order. Enforcement of this order is merely the bankruptcy court's exercise of its jurisdiction over the State in the course of adjudicating the proof of claim filed by the State in the Headricks' bankruptcy proceeding. Similarly, in *In re Burke*, the Burkes' action is in substance one to enforce the discharge injunction entered by the bankruptcy court. We note that in *In re Burke*, the State of Georgia sent a demand letter to the Burkes after the Burkes' bankruptcy proceeding was closed. Therefore, the Burkes reopened their bankruptcy case in order to file an adversary action against the State. We conclude that the bankruptcy court retained jurisdiction over the State in order to enforce the judgment it had entered as part of adjudicating the State's claim in the Burkes' bankruptcy case.

The Supreme Court's decision in *Gardner* establishes that, by filing a proof of claim in the debtors' respective bankruptcy proceedings, the State waived its sovereign immunity for purposes of the adjudication of those claims. We hold that this waiver includes the bankruptcy court's enforcement of the discharge injunction and the automatic stay in the instant cases. We believe that the enforcement of the bankruptcy court's orders in both of the instant cases falls easily within the waiver of immunity "respecting the adjudication of the claim" found by the Supreme Court in *Gardner*, 329 U.S. at 574, 67 S.Ct. at 472. We emphasize that our holding regarding the State's waiver of Eleventh Amendment immunity is quite narrow because the debtors seriously seek to recover only the costs and attorneys' fees incurred in enforcing the bankruptcy court's automatic stay and discharge injunction.[12] Therefore, addressing only the live issues in this case, we hold that the State of Georgia has waived its Eleventh Amendment immunity to the extent of the attorneys' fees and costs incurred by the debtors in enforcing

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[12] The district court noted that "the Burkes and the Headricks will have difficulty proving that they suffered any *real* damage from the Revenue Department's actions, which amounted to nothing more than sending a few collection letters. Perhaps only nominal damages will flow from the Revenue Department's actions." District Court Order, at 8 n. 3 (July 23, 1997). At oral argument, the debtors' attorney conceded that there was no indication that damages in the two cases would go beyond the costs and attorneys' fees incurred in enforcing the bankruptcy court's automatic stay and discharge injunction.

the bankruptcy court's automatic stay and discharge injunction.[13]

III. CONCLUSION

For the foregoing reasons, we affirm the district court's affirmance of the bankruptcy court's orders denying the State of Georgia's motion to dismiss in *In re Burke* and its motion for summary judgment in *In re Headrick*.

AFFIRMED.

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[13] In dicta, the court in *In re Creative Goldsmiths*, 119 F.3d at 1148, indicated that "to the extent a defendant's assertions in a state-instituted federal action, including those made with regard to a state-filed proof of claim in a bankruptcy action, amount to a *compulsory* counterclaim, a state has waived any Eleventh Amendment immunity against the counterclaim in order to avail itself of the federal forum." In the instant case, we need not address whether the scope of the State's waiver of Eleventh Amendment immunity extends to the full scope indicated by the Fourth Circuit in *In re Creative Goldsmiths*.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION

IN RE: GARY BURKE and PAMELA B. BURKE, Debtors.	* Chapter 7 * Case No. 92-11482-JSD * * Adversary Proceeding * No. 95-01050A
STATE OF GEORGIA, DEPARTMENT OF REVENUE, Appellant, vs. GARY BURKE and PAMELA B. BURKE, Appellees.	* * * * * * No. CV197-42 * * * * *
IN RE: RAYMOND D. HEADRICK and CYNTHIA J. HEADRICK, Debtors.	* Chapter 13 * Case No. 94-12007-JSD * * Adversary Proceeding * No. 96-01027A
STATE OF GEORGIA, DEPARTMENT OF REVENUE, Appellant, vs. RAYMOND D. HEADRICK and CYNTHIA J. HEADRICK, Appellees.	* * * * * * No. CV197-43 * * * * *

ORDER

(Filed Jul. 23, 1997)

These bankruptcy appeals by the State of Georgia raise the following issues: (1) did 11 U.S.C. §106(a) validly abrogate the Eleventh Amendment so that a federal bankruptcy court may exercise jurisdiction over an adversary proceeding against the State of Georgia for money damages; and (2) did the State of Georgia, via the Department of Revenue, waive its Eleventh Amendment immunity by filing a proof of claim in the captioned bankruptcy cases. The Bankruptcy Court determined that §106(a) validly abrogated Georgia's immunity and that regardless, the filing of a proof of claim by the Department of Revenue effected a waiver of immunity. Upon consideration of the record on appeal and the briefs submitted by counsel, I find that Georgia's Eleventh Amendment immunity was validly abrogated by 11 U.S.C. §106(a). Accordingly, the orders of the Bankruptcy Court appealed from are hereby **AFFIRMED** on that basis. The issue of waiver will not be addressed.

I. BACKGROUND

In August 1992, Gary and Pamela B. Burke sought relief under Chapter 13 of the Bankruptcy Code. The Georgia Department of Revenue filed a proof of claim that included an unsecured priority claim of $12,437.40 for unpaid state income taxes covering the tax years 1980-1984. This claim was later adjudged a general unsecured claim. On February 1, 1994, the case having been converted to Chapter 7, the Bankruptcy Court

entered a general discharge order releasing the Debtors from liability for all dischargeable debts. Before the case was closed, however, neither party requested that the Bankruptcy Court determine whether or not the taxes accrued in 1980-1984 were discharged.

On May 3, 1994, roughly three months after the entry of discharge, the Department of Revenue wrote the Burkes a letter demanding payment of these taxes. The Burkes reopened their Chapter 7 case and subsequently filed an adversary proceeding against the State of Georgia for damages, costs, and attorney's fees, contending that by sending the demand letter the Department of Revenue violated the discharge injunction of 11 U.S.C. §524. The State of Georgia moved for summary judgment, contending that it could not have violated the discharge injunction since the taxes in question were nondischargeable. The Bankruptcy Court denied this motion, finding that the taxes were indeed discharged.

The State then moved to dismiss the case, arguing that the relief sought by the Burkes was barred by the Eleventh Amendment. The State conceded that in 11 U.S.C. §106(a) Congress clearly indicated an intent to abrogate the States' Eleventh Amendment immunity and allow recovery of monetary damages against the States in actions arising under the Bankruptcy Code, including §524. The State argued, however, that §106(a) was an invalid attempt to abrogate the Eleventh Amendment, relying on *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996), which held that the powers of Congress conferred by Article I cannot be used to abrogate the Eleventh Amendment. The Bankruptcy Court initially declined to address this issue, relying instead on its finding that the

State had waived its immunity by filing a proof of claim in the bankruptcy case. *See In re Burke*, 200 B.R. 282 (Bankr. S.D. Ga. 1996). Upon reconsideration, however, the Court addressed and rejected the State's argument that §106(a) was unconstitutional. *See In re Burke*, 203 B.R. 493 (Bankr. S.D. Ga. 1996). The Bankruptcy Court determined that although in view of *Seminole Tribe* the Bankruptcy Clause of Article I does not empower Congress to abrogate the Eleventh Amendment, that abrogation can nonetheless be accomplished under the Fourteenth Amendment. *See id.* at 495-97.

The Bankruptcy Court made a similar determination in the *Headrick* case. Raymond D. and Cynthia J. Headrick filed a petition for relief under Chapter 13 on December 28, 1994. The Department of Revenue filed a proof of claim (voluntarily amended later) for state income taxes. With respect to these taxes, the Department of Revenue issued on October 24, 1995, an "Official Assessment and Demand for Payment" against Debtors, and followed on December 21, 1995, with a "Collection Notice" demanding immediate payment and warning that nonpayment would result in collection by levy, garnishment, or attachment. Subsequently, the Headricks filed an adversary proceeding against the State of Georgia for damages, costs, and attorney's fees, contending that by issuing the assessment and collection notice the Department of Revenue had violated the automatic stay prescribed by 11 U.S.C. §362. The State of Georgia moved for summary judgment, arguing that it was entitled to sovereign immunity and, alternatively, that as a matter of law it had not violated the automatic stay. The Bankruptcy Court found both grounds without merit and denied the motion. *See In*

re Headrick, 200 B.R. 963 (Bankr. S.D. Ga. 1996). As in *Burke*, the Bankruptcy Court found that *Seminole Tribe* did not foreclose federal jurisdiction because the Fourteenth Amendment granted Congress authority to abrogate the State of Georgia's Eleventh Amendment immunity. *See id.* at 965-67. The court held alternatively that the State had waived its immunity by filing a proof of claim in the Headrick's Chapter 13 case. *See id.* at 967-69. As for whether the State's collection efforts violated the automatic stay, the court found that issues of fact precluded summary judgment. *See id.* at 969-70. The State's request for reconsideration was denied. *See In re Headrick*, 203 B.R. 805 (Bankr. S.D. Ga. 1996).

III. ANALYSIS

In general, the Eleventh Amendment bars federal jurisdiction over suits against unconsenting States. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). However, the Eleventh Amendment bar may be lifted, permitting a federal court to exercise jurisdiction, if Congress has validly abrogated the States' sovereign immunity. *See id.* at 99. In both *Burke* and *Headrick*, the Bankruptcy Court determined that federal jurisdiction was proper because the State of Georgia's Eleventh Amendment immunity was validly overridden by 11 U.S.C. §106(a). I concur.

Congress may abrogate the States' Eleventh Amendment immunity if (1) it has "unequivocally expresse[d] its intent to abrogate the immunity"; and (2) it has acted "pursuant to a valid exercise of power." *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1123 (1996) (quoted

source omitted). In §106(a), Congress clearly and unequivocally expressed an intent to override the States' sovereign immunity for actions arising out of certain specifically enumerated provisions of the Bankruptcy Code, including §362 (automatic stay injunction) and §524 (discharge injunction).[1] Thus, the key issue is whether §106(a) was enacted pursuant to a valid exercise of power, or, put another way, whether §106(a) was "passed pursuant to a constitutional provision granting Congress the power to abrogate." *Seminole Tribe*, 116 S.Ct. at 1125 (citation omitted). In *Seminole Tribe*, the Supreme Court held that Congress may not abrogate the States' Eleventh Amendment immunity via exercise of its Article I powers. *See id.* ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations upon federal jurisdiction."). Accordingly, the case law now uniformly acknowledges that Congress did not have power to enact §106(a) pursuant to those powers granted it under the Bankruptcy Clause of Article I. *See Wyoming Dep't of Transp. v. Straight (In re Straight)*, Ch. 13 Case No. 95-10007, Adv. No. 956-CV-0184-J, 1997 WL 274282, at *11 (D. Wyo. May 15, 1997) (noting uniformity of agreement). *Seminole Tribe* indicates that there is only one source of authority by which Congress may abrogate the Eleventh Amendment: §5 of the Fourteenth Amendment. *See Seminole Tribe*, 116 S.Ct. at 1125. In §1 of the Fourteenth Amendment, the following prohibitions are aimed

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[1] Section 106(a) purports to abrogate the sovereign immunity of any "governmental unit," which is defined in §101(27) to include the States.

directly at the States: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." Relying in part on *In re Southern Star Foods, Inc.*, 190 B.R. 419 (Bankr. E.D. Okla. 1995), a case decided before *Seminole Tribe*,[2] the Bankruptcy Court determined that the bankruptcy code creates privileges and immunities enforceable by Congress under §5 of the Fourteenth Amendment. The Oklahoma court summarized these privileges as follows:

> the privilege of efficient liquidation or other use and ratable distribution of a debtor's assets, or (to put it another way) with immunity from the inefficient liquidation or use and inequitable distribution of a debtor's assets which may obtain under State laws; the privilege of discharge, or (to put it another way) with immunity from oppressive debt collection which may obtain under State laws; liberty from economic bondage, and protection against undue loss of value of property in exigent financial circumstances; and fair and efficient determination of all of the above, according to the process due in

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[2] The State of Georgia points out that In re *Southern Star Foods, Inc.*, predates the *Seminole Tribe* decision. This fact, while true, is irrelevant. Fairly read, *Seminole Tribe* expressly provides that pursuant to §5 of the Fourteenth Amendment, Congress may still validly abrogate the States' Eleventh Amendment immunity. Since the Oklahoma court relied upon the Fourteenth Amendment in upholding §106(a), not the Bankruptcy Clause of Article I, its rationale remains intact.

> a national court of equitable jurisdiction, without regard to persons or to any special privileges save those considered by Congress to be justified as a matter of policy.

Id. at 426. At least one other federal court, the United States District Court for Wyoming, has followed this line of reasoning. *See Straight*, 1997 WL 274282, *18. I too elect to follow this reasoning. As the Wyoming court noted, the issue of whether the §106(a) abrogation of immunity is valid under §5 of the Fourteenth Amendment is one that "will ultimately require an analysis and disposition by a higher court." *Id.* In the absence of definitive guidance from a higher court, I believe that deference to Congress' clear expression of intent to abrogate the States' immunity is appropriate since there is at least an arguably valid constitutional basis under which Congress could have acted. Until a higher court speaks, I will defer to Congress.[3]

III. CONCLUSION

For the foregoing reasons, the Bankruptcy Court's orders in *Burke* and *Headrick*, holding that §106(a) validly abrogates the State of Georgia's Eleventh Amendment immunity, are hereby **AFFIRMED**. These cases are

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[3] It is beside the point but worth noting that the Burkes and the Headricks will have difficulty proving that they suffered any *real* damage from the Revenue Department's actions, which amounted to nothing more than sending a few collection letters. Perhaps only nominal damages will flow from the Revenue Department's actions.

REMANDED to the Bankruptcy Court for further proceedings.

ORDER ENTERED at Augusta, Georgia, this 23rd day of July, 1997.

/s/ Dudley H. Bowen, Jr.
UNITED STATES DISTRICT JUDGE

United States District Court
Southern District of Georgia

IN RE: GARY BURKE and PAMELA B. BURKE, Debtors.	JUDGMENT IN A CIVIL CASE
STATE OF GEORGIA, DEPARTMENT OF REVENUE, Appellants, v. GARY BURKE and PAMELA B. BURKE, Appellees.	(Filed Jul. 24, 1997) CASE NUMBER: CV197-42 (Chap. 7 Case No. 92-11482-JSD) (Adv. Proc. No. 95-01050A)

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that, in accordance with the Order of this court entered on July 23 1997, the Bankruptcy Court's order is hereby AFFIRMED, and this case is hereby REMANDED to the Bankruptcy Court for further proceedings.

July 24, 1997
Date

Henry R. Crumley, Jr.
Clerk

/s/ Emmie S. Flanders
(By) Deputy Clerk

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:	)	Chapter 7 Case
GARY BURKE	)	Number 92-11482
PAMELA B. BURKE	)	
Debtors	)	
	)	
GARY BURKE	)	Adversary
PAMELA B. BURKE	)	Proceeding
Plaintiffs	)	Number
	)	95-01050A
vs.	)	
STATE OF GEORGIA, ACTING THROUGH ITS AGENCY, THE DEPARTMENT OF REVENUE	)	
Defendant	)	

ORDER

(Filed Dec. 16, 1996)

Gary and Pamela Burke (hereinafter "Debtors") filed their complaint against the State of Georgia acting through its agency the Department of Revenue (hereinafter "Georgia") alleging a violation of the discharge injunction of 11 U.S.C. §524(a).[1] Georgia filed this motion

[1] 11 U.S.C. §524(a) provides:

a) A discharge in a case under this title –

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the

to alter or amend this court's order denying Georgia's motion to dismiss for lack of jurisdiction. *Burke v. Georgia (In re Burke)*, 200 B.R. 282 (Bankr. S.D. Ga. 1996). The motion is denied. The facts necessary to resolve this motion are set forth in the order.

The Debtors filed a Chapter 13 case on August 14, 1992. On December 1, 1992, Georgia filed a proof of claim for state income taxes, including a secured claim of $856.21 for the tax year 1990, an unsecured priority claim

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personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived.

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1) of this title, or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

of $12,437.40 for taxes and interest for the tax years 1980 through 1984, and a general unsecured claim of $1,810.50 for tax penalties incurred from 1980 through 1984. The Debtors objected to the priority status asserted in the $12,437.40 claim. By order dated May 18, 1993 following a contested hearing, I sustained the objection and allowed the $12,437.46 claim as general unsecured. The Debtors converted their case to Chapter 7 on July 20, 1993, and received a discharge on February 1, 1994. Neither Georgia nor the Debtors filed an action to determine the dischargeability of these taxes under 11 U.S.C. §523[2] prior to the case closing on February 9, 1994.

On May 3, 1994, Georgia sent a letter to the Debtors demanding payment of the 1990 taxes and the taxes for the years 1980-1984. On January 27, 1995, the Debtors

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[2] 11 U.S.C S523(a)(1) provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

(1) for a tax or a customs duty –

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required-

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax.

moved to reopen their Chapter 7 case. Thereafter, the Debtors instituted this action against Georgia alleging that the demand letter violated the § 524(a) discharge injunction. Georgia filed a motion for summary judgment, alleging that the taxes were not discharged, and that it therefore did not violate the injunction. On August 9, 1995, I entered an order finding that the 1990 taxes were not discharged, but that the 1980-1984 taxes including accrued interest and penalties were discharged by the February 1, 1994 order. Following my denial of Georgia's subsequent motion to dismiss the complaint for lack of jurisdiction, Georgia moves to alter or amend that order.

Georgia asserts that the waiver of immunity provision of 11 U.S.C. §106[3] is unconstitutional under the

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[3] 311 U.S.C. §106 provides: Waiver or sovereign immunity.

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for a costs or fees under this title or the Federal Rules of Bankruptcy Procedure

Supreme Court's decision in *Seminole Tribe v. Florida*, ___ U.S. ___, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), and that it is therefore immune from suit in this court under the Eleventh Amendment to the United States Constitution.[4] In my previous order, I declined to find §106 unconstitutional for two reasons: 1) this court lacks Article III authority to declare an act of Congress unconstitutional; and 2) Georgia's filing a Proof of Claim against the

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against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

(b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

(c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate. (emphasis added)

[4] U.S. Const. Amend. 11 provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Debtors waived its immunity from suit in this court, rendering analysis of §106 moot. *Burke v. Georgia (In re Burke)*, 200 B.R. 282 (Bankr. S.D. Ga. 1996). Subsequent to publishing this opinion, I decided *Headrick v. Georgia (In re Headrick)*, 200 B.R. 963 (Bankr. S.D. Ga. 1996), a case dealing with Georgia's claimed immunity from suit for violating the §362 automatic stay. This order incorporates my reasoning in *Headrick*, and upholds the judgment that Georgia is not immune from suit for violations of the discharge injunction.

I. THE FOURTEENTH AMENDMENT GRANTS CONGRESS AUTHORITY TO WAIVE GEORGIA'S ELEVENTH AMENDMENT IMMUNITY FROM SUIT BY INDIVIDUALS FOR GEORGIA'S VIOLATION OF THE DISCHARGE INJUNCTION.

By its express terms, the Eleventh Amendment to the United States Constitution immunizes a State from suit in federal court by a non-resident of that State. Despite this narrow language, the Supreme Court has consistently interpreted the Eleventh Amendment to immunize States from suits by any individual, whether a resident of that State or of another State. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). This immunity restricts Congress' ability to create rights of action against States in federal court under Congress' Article I powers unless the State consents to suit. *Seminole Tribe v. Florida*, ___ U.S. ___, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (Congress cannot abrogate a State's immunity from suit by creating a right of action against the State under the Indian Commerce Clause.)

The Supreme Court established a two prong test to determine whether Congress may abrogate a State's immunity: " . . . first, whether Congress has unequivocally expressed its intent to abrogate the immunity, and second, whether Congress has acted pursuant to a valid exercise of power." (citations omitted) *Seminole* Tribe at 1123. In *Seminole Tribe*, the Supreme Court acknowledged that Congress had unequivocally acted to abrogate State immunity from suit under the Indian Gaming Regulatory Act, 25 U.S.C. §2701 et seq., but ruled that the Indian Commerce Clause of the Constitution (U.S. Const., Art. I, §8, cl.3[5]) did not authorize Congress to abrogate this immunity. In determining that the Indian Commerce Clause did not authorize Congress to subject a State to suit in federal court by an individual, the Court reversed the line of cases holding that the Commerce Clause authorizes Congress to act so. See *e.g., Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989).

Bankruptcy Code title 11 §106 unequivocally expresses Congressional intent to abrogate the States' sovereign immunity by subjecting them to damage awards for violations of the automatic stay. *See, In Re Merchants Grain, Inc.*, 59 F.3d 630 (7th Cir. 1995) *vacated and remanded sub nom., Ohio v. Mahern*, ___ U.S. ___, 116 S.Ct. 1411, 134 L.Ed.2d 537 (1996) (Congress' 1994 revision of §106 unequivocally evidenced its intent to abrogate the States' immunity from suit). The question is

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[5] U.S. Const. Art. I §8, cl. 3 provides that Congress shall have the power: To regulate commerce with foreign nations, and among the several States and with the Indian tribes.

whether Congress has authority to abrogate this immunity under the Bankruptcy Clause of the United States Constitution (U.S. Const. Art. I, §8, Cl.4[6]). Answered yes by the Seventh Circuit in *Merchants Grain*, but remanded by the Supreme Court for reconsideration in light of *Seminole Tribe* 116 S.Ct. at 1411.

Under the rationale articulated in *Seminole Tribe*, Congress is not authorized to abrogate the States' immunity under the Bankruptcy Clause of the United States Constitution. 116 S.Ct. at 1131, n.16; *Id.* at 1134 (Stevens' dissent). However, in *Seminole* Tribe the Supreme Court recognized and reaffirmed Congress' ability to abrogate a State's immunity under the express language of the Fourteenth Amendment.[7] 116 S.Ct. at 1125. The Supreme

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[6] U.S. Const. Art. I Sec. 8, Cl. 4 provides that Congress shall have the power:

[4.] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.

[7] U.S. Const. Amend. 14 provides in pertinent part:

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

Section 5. Power to enforce amendment.

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Court did not not address whether the Fourteenth Amendment authorized Congress to enforce the Indian Gaming Regulatory Act against the States because the petitioner abandoned this issue after the Eleventh Circuit Court of Appeals rejected its argument that the Indian Gaming Regulations Act created a liberty and property interest subject to Congress' protection under the Fourteenth Amendment. *Id.* at 1125.

The Fourteenth Amendment expressly gives Congress the authority to pass laws to prevent the States from abridging citizens' privileges and immunities. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976).

> "The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, *under the laws and Constitution of the United States*, are incident to citizenship of the United States, but does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law." (emphasis added, citations omitted).

Snowden v, Hughes, 321 U.S. 1, 6-7, 64 S.Ct. 397, 400, 88 L.Ed. 497 (1944). Article I empowers Congress to create a uniform bankruptcy code, which bankruptcy code provides certain protections to debtors which are privileges and immunities of federal citizenship. The Fourteenth Amendment extends to Congress the right to enforce those privileges and immunities by creating private rights of action against the States. In §106, Congress unequivocally expressed its intent to abrogate Georgia's immunity, and this abrogation was enacted by a valid

exercise of power under the Fourteenth Amendment. *See, Mather v. Oklahoma Employment Sec. Comm'n (In re Southern Star Foods, Inc.)*, 190 B.R. 419 (Bankr. E.D. Okl. 1995). (Article I gives Congress the power to enact uniform laws of bankruptcy, and the Fourteenth Amendment authorizes Congress to create federal rights of action against the States to enforce the provisions of the Bankruptcy Code in federal court notwithstanding the States' Eleventh Amendment immunity.); *Headrick v. Georgia (In re Headrick*, 200 B.R. 963 (Bankr. S.D. Ga. 1996), *citing, Fitzpatrick v. Bitzer*, 427 U.S. 445, 965 S.Ct. 2666, 49 L.Ed.2d 614 (1976) (The Fourteenth Amendment specifically authorizes Congress to abrogate the States' Eleventh Amendment immunity.)

II. EVEN IF GEORGIA IS IMMUNE FROM SUIT FOR ITS ALLEGED VIOLATIONS OF THE DISCHARGE INJUNCTION, IT HAS WAIVED THAT IMMUNITY BY FILING A PROOF OF CLAIM AGAINST THE DEBTORS.

Georgia's filing a proof of claim in this case waived its sovereign immunity with regard to this court's adjudication of its tax claim against the Debtors. *Gardner v. New Jersey*, 329 U.S. 565, 67 S.Ct. 467, 91 L.Ed. 504 (1946) *reh'g denied*, 330 U.S. 853, 67 S.Ct. 768, 91 L.Ed. 1296 (1947). However, Georgia asserts that this holding would effectively allow a debtor to assert any claim the debtor holds against a State, notwithstanding the fact that the claims may have no logical connection with the filed claim. It is not necessary that I explore the outer limits of Georgia's immunity waiver. The instant action does not involve a claim by the Debtor unrelated to the claim adjudication

process, e.g. a breach of contract or tort claim. *Compare, Ellenburg v. Board of Regents (In re Midland Mechanical Contractors, Inc.)*, 200 B.R. 453 (Bankr. N.D. Ga. 1996).

After submitting its tax claim to the jurisdiction of this court, Georgia allegedly attempted to collect the taxes in willful contravention of the discharge injunction to which Georgia had, at least, subjected itself by participating in the bankruptcy process. By submitting itself to this court's claim adjudication process, Georgia admittedly subjected itself to the court's authority to determine the amount of the claim, the priority of payment of the claim from assets of the Chapter 7 estate, and the dischargeability of all or part of the claim asserted. This submission necessarily extends not only to the determination of these issues, but also to the enforcement of that determination, lest the determination be rendered meaningless. Bankruptcy courts maintain the equitable jurisdiction to achieve the orderly and expeditious disposition of bankruptcy cases without interference by parties within its jurisdiction, whether by statute or by consent. *Langenkamp v. Culp*, 498 U.S. 421 111 S.Ct. 330, 112 L.Ed.2d 343 (1990), rehearing denied, 498 U.S. 1043, 111 S.Ct. 721 (1990), *citing Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989) (Both cases dealt with a creditor's right to jury trial under the Seventh Amendment to the United States Constitution.) The rationale used in *Granfinanciera* and *Langenkamp* applies equally here.

> In *Granfinanciera* [the Supreme Court] recognized that by filing a claim against a bankruptcy estate the creditor triggers the process of 'allowance and disallowance of claims,' thereby

> subjecting himself to the bankruptcy court's equitable power. 492 U.S. at 58-59, and n.14, 109 S.Ct. at 2799-2800, and n.14 (citing [*Katchen v. Landy*, 382 U.S. 323 at 336, 86 S.Ct. 467 at 476 15 L.Ed.2d. 391 (1966)]).
>
> If the creditor is met, in turn, with a preference action from the trustee, that action becomes part of the claims-allowance process which is triable only in equity. *Ibid.* In other words, the creditor's claim and the ensuing preference action by the trustee become integral to the restructuring of the debtor creditor relationship through the bankruptcy court's *equitable jurisdiction. Granfinanciera, supra,* 492 U.S. at 57-58, 109 S.Ct. at 2798-2799.

Langenkamp supra 498 U.S., at 44, 111 S.Ct. at 331. In this case Georgia has voluntarily subjected itself to this court's equitable power, including enforcement of the discharge injunction which precludes collecting discharged debts.

It is therefore ORDERED that Georgia's motion to alter or amend is DENIED.

/s/ John S. Dalis
JOHN S. DALIS
CHIEF UNITED STATES
BANKRUPTCY JUDGE

Dated at Augusta, Georgia this 16th day of December, 1996

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE: RAYMOND D. HEADRICK CYNTHIA J. HEADRICK Debtors	)	Chapter 13 Case Number 94-12007
RAYMOND D. HEADRICK CYNTHIA J. HEADRICK Plaintiffs vs. STATE OF GEORGIA, ACTING THROUGH ITS AGENCY, THE DEPARTMENT OF REVENUE Defendant	)	Adversary Proceeding Number 96-01027A

ORDER

(Filed Dec. 17, 1996)

The Georgia Department of Revenue (hereinafter "Georgia") by motion seeks to alter or amend the order dated September 26, 1996 denying Georgia's motion for summary judgment in this adversary proceeding filed by Raymond and Cynthia Headrick (hereinafter "Debtors") alleging violations of the automatic stay, 11 U.S.C. §362.[1]

[1] 11 U.S.C. §362 provides in relevant part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of –

The Court has jurisdiction to hear the complaint as a core bankruptcy proceeding under 28 U.S.C. §157(b)(2)(A)(B) & (O). The motion is denied.

The facts, viewed in a light most favorable to the Debtors, are restated from the previous order. The Debtors filed a Chapter 13 case on December 28, 1994. On April 10, 1995 Georgia filed a proof of claim for state income taxes. The Debtors objected to Georgia's claim, which claim Georgia voluntarily reduced after receiving a copy of the Debtors' 1993 tax return.

On October 24, 1995, Georgia issued a document titled "Official Assessment And Demand for Payment" (hereinafter "Assessment") against the Debtors. On December 21, 1995, Georgia issued to the Debtors a document titled "Collection Notice" (hereinafter "Notice"), which Notice contained demands for payment and threats of collection by levy, garnishment or attachment. Thereafter, the Debtors instituted this action against Georgia alleging that the collection attempts violated the

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(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; . . .

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title; . . .

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney's fees, and, in appropriate circumstances, may recover punitive damages.

§362 stay. Georgia filed a motion for summary judgment alleging that this court lacks jurisdiction to hear the action asserting an Eleventh Amendment[2] bar to the debtors' complaint, or in the alternative that Georgia's actions did not violate the automatic stay as a matter of law, which motion was denied. Georgia now requests that I reverse my prior ruling and grant it summary judgment.

I. THE FOURTEENTH AMENDMENT GRANTS TO CONGRESS THE AUTHORITY TO SUBJECT GEORGIA TO CAUSES OF ACTION FILED BY INDIVIDUALS TO ENFORCE THE PROVISIONS OF AND RECOVER DAMAGES FOR VIOLATION OF THE AUTOMATIC STAY.

The Supreme Court has established a two prong test for determining whether Congress may abrogate the States' Eleventh Amendment immunity from suit in federal court: " . . . first, whether Congress has unequivocally expressed its intent to abrogate the immunity, and second, whether Congress has acted pursuant to a valid exercise of power." (citations omitted). *Seminole Tribe v. Florida*, ___ U.S. ___, 116 S.Ct. 1114, 134 L.Ed.2d 252

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[2] United States Const. Amend 11 provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

(1996). Bankruptcy Code, title 11 §106,[3] unequivocally expresses Congressional intent to abrogate the States' sovereign immunity by subjecting them to individual

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[3] 11 U.S.C. §106 provides: waiver of sovereign immunity.

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for a costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules

damage awards for violations of the automatic stay. *See, In Re Merchants Grain, Inc.*, 59 F. 3d 630 (7th Cir. 1995) *vacated and remanded sub nom., Ohio v. Mahern*, ___ U.S. ___, 116 S.Ct. 1411, 134 L. Ed. 2d 537 (1996) (Congress' 1994 revision of §106 unequivocally evidenced its intent to abrogate the States' immunity from suit). The question is whether Congress has authority to abrogate this immunity under the United States Constitution.

In my previous Order, I found that the protections of the Bankruptcy Code are congressional expression of specific privileges and immunities incident to federal citizenship, and that Congress may therefore enact legislation enforceable against the States in federal court under the Fourteenth Amendment of the United States Constitution.[4] *Headrick v. Georgia (In re Headrick)*, 200 B.R. 963

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of Bankruptcy Procedure, or nonbankruptcy law.

(b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

(c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate. (emphasis added)

[4] U.S. Const. Amend. 14 provides in pertinent part: Section 1. Citizens of the United States. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

(Bankr. S.D. Ga. 1996), *citing, Fitzpatrick v. Bitzer*, 427 U.S. 445, 965 S.Ct. 2666, 49 L.Ed.2d 614 (1976) (The Fourteenth Amendment specifically authorizes Congress to abrogate the States' Eleventh Amendment immunity.) In seeking reconsideration of this order, Georgia presents two unpersuasive arguments against this holding: 1) that Congress did not expressly enact the Bankruptcy Code pursuant to the Fourteenth Amendment, thereby precluding its application to the Bankruptcy Reform Act of 1994; and 2) that such a holding is contrary to the Supreme court's decision in *Seminole Tribe*.

The *first* requirement for a valid abrogation of the States' immunity places upon Congress the burden of unequivocally expressing its intent to abrogate immunity in clear and unambiguous language. This first requirement does not require Congress to specify a constitutional provision as its basis. The *second* requirement, whether Congress has authority to abrogate, is a determination made by a court exercising the judicial power of the United States under Article III of the Constitution, not Congress nor this court. *Marbury v. Madison*, 5 U.S. 137, 2 L.Ed 60 (1803) (Under Article III of the Constitution, it is the province and duty of the judiciary, not the legislature,

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States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

Section 5. Power to enforce amendment.

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

to resolve conflicts between statutes and the Constitution); *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 58-59, 102 S.Ct. 2858, 2865, 73 L.Ed.2d 598 (1982) (Bankruptcy courts lack the judicial powers of Article III courts.)[5]

Georgia also argues that my holding is contrary to the reasoning articulated in *Seminole Tribe*, and that failing to reverse the decision would be a de facto finding that Congress has authority to abrogate the State's immunity under any federal statute. The *Seminole Tribe* decision recognized and reaffirmed Congress' ability to abrogate a States' immunity under the Fourteenth Amendment. 116 S.Ct. at 1125. The Supreme Court did not analyze the constitutionality of the Indian Gaming Regulations Act under the Fourteenth Amendment because the petitioner abandoned this argument after the Eleventh Circuit Court of Appeals rejected its contention that the Indian Gaming Regulations Act created a liberty and property interest

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[5] Although this court lacks the judicial power of review under Article III of the Constitution, when presented with a constitutional challenge to a federal statute sought to be enforced in this court, this court does not automatically lose jurisdiction. The bankruptcy court must address the issue presented and if the court determines a valid constitutional challenge exists, the bankruptcy court must submit proposed findings to the district court with a recommendation to withdraw the reference as to the constitutional challenge. 28 U.S.C. §157(c)(a)(1), (d). If the bankruptcy court determines, as I do here, that no valid constitutional challenge to the statute exists, it is incumbent upon the bankruptcy court to retain jurisdiction and resolve, as here, the core proceeding. See, *Knox v. Lee*, 79 U.S. (12 Wall.) 457, 531, 20 L.Ed. 287 (1870) (Acts of Congress are presumptively constitutional unless determined otherwise in an Article III court).

subject to Congress' protection under the Fourteenth Amendment. Id. at 1125. *Seminole Tribe* therefore did not address whether Congress has authority under the Fourteenth Amendment to enforce a Debtor's right, as a citizen of the United States, to monetary relief for State actions which violate the automatic stay provisions of section 362 of title 11, the Bankruptcy Code. Furthermore, the rationale supporting Congress' abrogation of Georgia's immunity in this case does not, as Georgia asserts, allow Congress to abrogate the States' immunity under all federal statutes. The analysis here is limited to the bankruptcy clause of the Constitution. The Constitution Article I Sec. 8 Clause 4 provides that Congress shall have the power of . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." In the exercise of this power Congress has enacted 11 U.S.C. §362 and, pursuant to 11 U.S.C. §106, has unequivocally subjected the States to the provisions of §362, including subsection (h). The privileges and immunities provided for under the uniform laws of bankruptcy applicable throughout the United States are incidences of federal citizenship against which, under the Fourteenth Amendment, no State may make or enforce any law abridging same. Additionally, the Fourteenth Amendment empowers Congress to enforce the provisions of the Fourteenth Amendment protecting the privileges and immunity of federal citizenship by appropriate legislation. Georgia may not therefore attempt to enforce its revenue collections statutes in defiance of the §362 stay and Congress, in a valid exercise of its power of enforcement

under the Fourteenth Amendment, can abrogate Georgia's sovereign immunity against individual suits in federal court for damages arising from its breach of the §362(a) stay brought pursuant to §362(h).

II. EVEN IF GEORGIA IS IMMUNE FROM SUIT FOR ITS ALLEGED VIOLATIONS OF THE AUTOMATIC STAY, IT HAS WAIVED THAT IMMUNITY BY FILING A PROOF OF CLAIM AGAINST THE DEBTORS.

In seeking to alter or amend my previous order in this case, Georgia concedes that its filing a proof of claim against the Debtor waives Georgia's sovereign immunity with regard to this court's adjudication of its tax claim against the Debtor under *Gardner v. New Jersey*, 329 U.S. 565, 67 S.Ct. 467, 91 L.Ed. 504 (1946) *reh'g denied*, 330 U.S. 853, 67 S.Ct. 768, 91 L.Ed. 1296 (1947). However, Georgia asserts that this waiver is limited, leaving intact its immunity from any claim the Debtor may assert against Georgia in this court. It is not necessary that I explore the limits of Georgia's immunity waiver. The instant action does not involve a claim by the Debtor unrelated to the claim adjudication process, e.g. a breach of contract or tort claim. *Compare, Ellenburg v. Board of Regents (In re Midland Mechanical Contractors. Inc.)*, 200 B.R. 453 (Bankr. N.D. Ga. 1996).

Georgia allegedly attempted to collect the taxes in willful contravention of the automatic stay to which Georgia had subjected itself by submitting its tax claim and participating in the bankruptcy claim adjudication

process. By submitting itself to this claim process, Georgia admittedly subjected itself to the court's authority to determine the amount of the claim and the dischargeability of all or part of the claim asserted. This submission to jurisdiction necessarily extends not only to the determination of these issues, but also to the enforcement of that determination, lest the determination be rendered meaningless. Bankruptcy courts maintain the equitable jurisdiction to achieve the orderly and expeditious disposition of bankruptcy cases without interference by parties within its jurisdiction, whether by statute or by consent. *Langenkamp v. Culp*, 498 U.S. 42, 111 S.Ct. 330, 112 L.Ed.2d 343 (1990), rehearing denied, 498 U.S. 1043, 111 S.Ct. 721 (1990), *citing Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989) (Both cases dealt with a creditor's right to jury trial under the Seventh Amendment to the United States Constitution.) As set forth in my initial findings, the rationale used *in Granfinanciera* and *Langenkamy* applies equally here.

> In *Granfinanciera* [the Supreme Court] recognized that by filing a claim against a bankruptcy estate the creditor triggers the process of 'allowance and disallowance of claims,' thereby subjecting himself to the bankruptcy court's equitable power. 492 U.S. at 58-59, and n.14, 109 S.Ct. at 2799-2800, and n.14 (citing [*Katchen v. Landy*, 382 U.S. 323 at 336, 86 S.Ct. 467 at 476 15 L.Ed.2d. 391 (1966)]).
>
> If the creditor is met, in turn, with a preference action from the trustee, that action becomes part of the claims-allowance process which is triable only in equity. *Ibid.* In other words, the creditor's claim and the ensuing preference action by the trustee become integral to the restructuring

> of the debtor-creditor relationship through the bankruptcy court's *equitable jurisdiction.*
>
> *Granfinanciera, supra,* 492 U.S. at 57-58, 109 S.Ct. at 2798-2799.

Langenkamp supra 498 U.S., at 44, 111 S.Ct. at 331.

In this case Georgia has voluntarily subjected itself to this court's equitable power, including enforcement of the automatic stay of collection efforts during the pendency of the case.

III. GEORGIA HAS NOT ESTABLISHED AS A MATTER OF LAW THAT IT IS ENTITLED TO SUMMARY JUDGMENT ON THE MERITS OF THE COMPLAINT.

Georgia contends that its did not violate the automatic stay as a matter of law because its actions are excepted from the automatic stay as a tax assessment under §362(b)(9)[6]. Although one of the notices is

---

[6] 11 U.S.C. §362(b)(9) provides in pertinent part:

(b) The filing of a petition under section 301, 302, or 303 of this title . . . does not operate as a stay –

(9) under subsection (a), of –

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect

denominated an "Official Assessment and Demand for Payment," potentially subject to the §362(b)(9) exception, the I second document is an attempt to collect the pre-petition taxes, leaving an issue of fact regarding the Debtor's right to recover damages for a stay violation, and making summary judgment in favor of Georgia inappropriate. *See, In re Ungar*, 104 B.R. 517, 520 (Bankr. N.D. Ga. 1989) (Although I.R.S. tax assessment is excepted from automatic stay, attempt to collect pre-petition taxes violates the automatic stay.)

It is therefore ORDERED that the State of Georgia's motion to alter or amend is DENIED.

/s/ John S. Dalis
JOHN S. DALIS
CHIEF UNITED STATES
BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 16th day of December, 1996.

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unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-8917

IN RE: GARY BURKE,
PAMELA BURKE, Debtors.

STATE OF GEORGIA,
DEPARTMENT OF REVENUE,

Plaintiff-Appellant,

versus

GARY BURKE; PAMELA BURKE,

Defendants-Appellees.

IN RE: RAYMOND D. HEADRICK,
CYNTHIA J. HEADRICK, Debtors.

THE STATE OF GEORGIA,
DEPARTMENT OF REVENUE,

Plaintiff-Appellant,

versus

RAYMOND D. HEADRICK;
CYNTHIA J. HEADRICK,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Georgia

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(Filed Sep. 15, 1998)

BEFORE: ANDERSON, AND BIRCH, Circuit Judges, and COHILL*, Senior District Judge.

PER CURIAM:

The petition(s) for rehearing filed by the State of Georgia, Department of Revenue is Denied.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson, III
UNITED STATES CIRCUIT JUDGE

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* Honorable Maurice B. Cohill, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

Supreme Court, U.S.
FILED
JAN 21 1999
CLERK

No. 98-906

In The

Supreme Court of the United States

October Term, 1998

STATE OF GEORGIA, DEPARTMENT OF REVENUE,

Petitioner,

v.

GARY BURKE and PAMELA B. BURKE and
RAYMOND D. HEADRICK and
CYNTHIA J. HEADRICK

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I

In unambiguously abrogating, in 11 U.S.C. § 106(a), States' Eleventh Amendment immunity in bankruptcy proceedings, did Congress validly legislate pursuant to the Fourteenth Amendment?

II

By filing a proof of claim against the debtors' estate, did Georgia waive its Eleventh Amendment immunity from proceedings to enforce the bankruptcy court's automatic stay and discharge injunction orders relevant to those claims?

TABLE OF CONTENTS

Page

Counter-Statement of Questions Presented . . . . . (i)
Opinions Below 1
Statement 1
Reasons for Denying the Writ 4
Conclusion 12

TABLE OF AUTHORITIES

CASES

AER-Aerotron v. Texas Dep't of Transp.,
104 F.3d 677 (5th Cir. 1998) 6
City of Boerne v. Flores,
117 S.Ct. 2157 (1997) 10
Clark v. Barnard,
108 U.S. 436 (1883) 7
Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,
148 F.3d 1343 (Fed. Cir. 1998),
cert. granted, 119 S.Ct. 512 (1999) 11
Gardner v. New Jersey,
329 U.S. 565 (1947) 4, 7, 8
In re Creative Goldsmiths,
119 F.3d 1140 (4th Cir. 1997) 6, 9, 10
In re Elias,
218 B.R. 80 (B.A.P. 9th Cir. 1998) 10
In re Fernandez,
130 F.3d 1138 (5th Cir. 1997) 8, 10
In re Lapin,
226 B.R. 637 (B.A.P. 9th Cir. 1998) 10
In re Platter,
140 F.3d 676 (7th Cir. 1998) 6, 8
In re Sacred Heart Hosp. of Norristown,
133 F.3d 237 (3d Cir. 1998) 10

In re Straight,
143 F.3d 1387 (10th Cir.),
cert. denied, 119 S.Ct. 446 (1998) 5, 6, 9
Moragne v. Illinois Dep't of Public Aid,
710 F.2d 1297 (7th Cir. 1983) 8
New York v. Irving Trust Co.,
288 U.S. 329 (1933) 7
Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996) 6, 10
State of Ohio v. Madeline Marie Nursing Homes,
694 F.2d 449 (6th Cir. 1982) 7
Texas v. Walker,
142 F.3d 813 (5th Cir. 1998) 5, 6
Wisconsin Dep't of Corrections v. Schacht,
118 S.Ct. 2047 (1998) 8

CONSTITUTION, STATUTES AND RULES

United States Constitution
Bankruptcy Clause, art. I 10
amend. XIV, § 1 . . . . . *passim*

Bankruptcy Code,
11 U.S.C. § 106(a) 9, 10
11 U.S.C. § 106(b) . . . . . *passim*
11 U.S.C. § 362 . . . . . *passim*
11 U.S.C. § 524 . . . . . *passim*

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

In its indication of Opinions Below, Pet. 1, Petitioner failed to indicate that the United States Bankruptcy Court for the Southern District of Georgia issued two sets of opinions in both *In re Burke*, 200 B.R. 282 (Bankr. S.D. Ga. 1996), motion to amend denied by, 203 B.R. 493 (Bankr. S.D. Ga. 1996); and *In re Headrick*, 200 B.R. 963 (Bankr. S.D. Ga. 1996), motion to amend denied by, 203 B.R. 805 (Bankr. S.D. Ga. 1996).

STATEMENT

1. Petitioner's statement fails to fully and precisely indicate the facts giving rise to the bankruptcy proceedings herein and the posture of the cases on review. This is a consolidated appeal of two bankruptcy proceedings: *Burke* and *Headrick*. For the purposes of the abrogation issue decided by the District Court (but not reached by the Court of Appeals), the only difference between the two cases is that *Burke* is a section 524(a) proceeding in which Georgia is alleged to have violated the discharge injunction granted to the Debtors, while *Headrick* is a § 362 proceeding for violation of the automatic stay. There are no other material facts that distinguish the cases.

On the issue of whether Georgia had waived its immunity by filing proofs of claim, the question decided by the Court of Appeals, the two cases are in a slightly different procedural posture, to wit:

a. *Headrick*. The essential fact which gave rise to the Bankruptcy Court's holding that Georgia had waived its Eleventh Amendment immunity in *Headrick* was that the State filed a proof of claim against the Headricks' bankruptcy estate on April 10, 1995. 200 B.R. at 965; 203 B.R. at 807. Furthermore, on October 24, 1995, Georgia issued a document titled "Official Assessment and Demand for Payment" against the Debtors, followed by a December 21, 1995, "Collection Notice" which contained demands for payment and threats of collection by levy, garnishment or attachment. 200 B.R. at 965; 203 B.R. at 807. It was at this juncture that the Headricks instituted an adversary action against Georgia for violation of the stay imposed under section 362 of the Bankruptcy Code. 200 B.R. at 965; 203 B.R. at 807.

b. *Burke*. Georgia filed a proof of claim against the Burkes' bankruptcy estate on December 1, 1992. 200 B.R. at 284; 203 B.R. at 494. The State subsequently participated in the adjudication of the bankruptcy estate. But, apparently unhappy with the priority of claims made by the Bankruptcy Court in the discharge injunction, Georgia sought nevertheless to collect on the tax debt that had been the subject of its proof of claim. So on May 3, 1994, the State issued a letter to the Debtors which contained demands for payment and threats of collection by levy, garnishment or attachment. 200 B.R. at 284; 203 B.R. at 494. The Burkes then reopened their Chapter 7 proceeding and a contempt motion was made against Georgia for violation of the discharge injunction imposed under section 524(a) of the Bankruptcy Code. 200 B.R. at 284; 203 B.R. at 494.

2. In both cases, the Bankruptcy Court ruled that Georgia had waived its Eleventh Amendment immunity for these proceedings *only*. *Headrick*, 200 B.R. at 967-69; 203

B.R. at 809-10; *Burke*, 200 B.R. at 288; 203 B.R. at 497-98. The Bankruptcy Court then found that, in *Burke*, Georgia had violated the discharge injunction of § 524 by making post-discharge collection efforts on discharged debts. *Burke*, 200 B.R. at 288. The Bankruptcy Court did not, however, rule on the merits of Headricks' section 362 action, holding that further factual questions remained as to whether Georgia's collection efforts violated the stay or injunction. *Headrick*, 200 B.R. at 970; 203 B.R. at 809.

The District Court, in an unpublished opinion, Pet. App. 17, ruled that Congress had manifestly abrogated the States' Eleventh Amendment immunity in legislating 11 U.S.C. § 106(a), and that such an abrogation was a proper exercise of Congress' power under the Privileges or Immunities and Due Process Clauses of the Fourteenth Amendment. Pet. App. 22-24.

The U.S. Court of Appeals for the Eleventh Circuit affirmed, but on the waiver ground ruled on by the Bankruptcy Court (but not the District Court). The Eleventh Circuit consequently chose not to address the abrogation issue raised under section 106(a) of the Bankruptcy Code. Pet. App. 8-9. The Court of Appeals also chose to premise its waiver ruling on the common law of State sovereign immunity in bankruptcy, and not the codification of that immunity in 11 U.S.C. § 106(b). Pet. App. 9-10 n.8.

The Court of Appeals went on to hold, that, by filing a proof of claim against both the Headrick and Burke estates, Georgia had waived any immunity in any subsequent proceedings to enforce the Bankruptcy Court's automatic stay and discharge injunction orders. Pet. App. 14. The Eleventh Circuit ruled that "the enforcement of the bankruptcy court's orders in both the instant cases falls easily within the waiver of immunity 'respecting the adjudication of the claim' found

by" this Court in previous decisions. Pet. App. 15 (quoting *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947)). The Eleventh Circuit also took care to limit its decision that Georgia had only waived any immunity as to the debtors' recovery of costs and attorneys' fees incurred in enforcing the Bankruptcy Court's automatic stay and discharge injunction. Pet. App. 15-16.

After a Petition for Rehearing was denied by the Eleventh Circuit, Pet. App. 49-50, this timely Petition for Certiorari followed.

REASONS FOR DENYING THE WRIT

1. In order to justify this Court's plenary review of the case, Petitioner vastly expands the holding below. The Eleventh Circuit most certainly did *not* rule that when a bankruptcy court exercises jurisdiction over a State which files a proof of claim that it also has jurisdiction over *all* adversary proceedings filed by the debtors against the State. See Pet. 7. Rather, the Eleventh Circuit's holding was exceedingly narrow as to both the nature of the bankruptcy proceeding that a State's waiver will be deemed to apply, as well as the kind of relief that may be sought from the State in that connection.

The court of appeals conditioned its waiver ruling for those situations (as here) where a State actively participates in a bankruptcy proceeding, is unsatisfied with the outcome, proceeds to defy the automatic stay or discharge injunction, and the debtor is consequently compelled to enforce the bankruptcy court's order. See Pet. App. 14. Moreover, the court below narrowed the relief available to recovery of costs and attorneys' fees incurred by the debtors in enforcing the

bankruptcy court's automatic stay and discharge injunction. Pet. App. 15-16. It is simply extravagant to suggest that the Eleventh Circuit's holding substantially broadens States' exposure to affirmative relief by debtors, assuming that such would be undesirable.

2. Respondents candidly acknowledge that there is discordant circuit authority concerning the modalities of waiver of States' Eleventh Amendment immunity in bankruptcy proceedings. But the conflict is not along the fault-lines that Petitioner has identified. Nor is the trend in the direction of cataclysmic tremors that Georgia prophesies. Rather, there has been a progressive reconciliation of circuit authority around the principle that States narrowly waive their Eleventh Amendment immunity in proceedings which arise out of the same transaction or occurrence as the proof of claim that a State agency files against a bankruptcy estate. Ambiguities do remain, though, and Respondents frankly recognize that because of the relatively simple posture of this case, it may be viewed as an ideal candidate for review.[1] Respondents submit, however, that in all respects, the decision below is correct.

a. The first subject of confusion is the source of relevant law for States' Eleventh Amendment immunity in bankruptcy. Respondents do question Georgia's assertion that there is a genuine split in circuit authority on the constitutionality of 11 U.S.C. § 106(b). That provision

[1] Respondents note that this Court denied certiorari in *Wyoming Dep't of Transportation v. Straight*, 119 S.Ct. 446 (1998) (No. 98-418) (seeking review of 143 F.3d 1387 (10th Cir. 1998)), raising similar (if not identical) issues of waiver of Eleventh Amendment immunity in bankruptcy. Consideration is pending in *Texas v. Walker*, No. 98-348 (U.S. filed Aug. 26, 1998) (seeking review of 142 F.3d 813 (5th Cir. 1998)). The *Walker* case raises the question of Eleventh Amendment immunity in bankruptcy proceedings in which a State has *not* filed a proof of claim, and thus its disposition would not necessarily be controlling here.

simply articulates a standard of waiver of State Eleventh Amendment immunity from compulsory counterclaims arising from the same transaction or occurrence as the proof of claim that a State filed against a bankruptcy estate. Respondents grant that although one Circuit (the Tenth, in *Wyoming Dep't of Transp. v. Straight*, 143 F.3d 1387 (10th Cir. 1998)) did uphold the constitutionality of that provision, it is by no means clear that any court of appeals has expressly held § 106(b) as violative of the Eleventh Amendment.[2]

Indeed, section 106(b) has been consistently understood by the courts of appeals following *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), as merely a codification of this Court's common law understanding that a State waives its sovereign immunity in federal bankruptcy proceedings when it appears to press a claim. This was precisely the position taken in the opinion below. See Pet. App. 9-10 n.8. See also *In re Platter*, 140 F.3d 676, 679-80 (7th Cir. 1998); *Texas v. Walker*, 142 F.3d 813, 823 (5th Cir. 1998), cert. applied for No. 98-348 (U.S. filed Aug. 26, 1998); *AER-Aerotron v. Texas Dep't of Transp.*, 104 F.3d 677, 681, 683 (4th Cir. 1997). Respondents maintain that whether § 106(b) is viewed as an independent test for waiver of States' Eleventh Amendment immunity or as a codification of pre-existing common law on the subject, it is constitutional.

b. The second source of difficulty is the actual

[2] *In re Creative Goldsmiths*, 119 F.3d 1140 (4th Cir. 1997), is doubtful as an unqualified rejection of the constitutionality of section 106(b). In that case, the statutory predicates for the assertion of waiver under that provision had not been satisfied. See id. at 1149 ("The trustee's action in this case . . . does not arise out of the same transaction or occurrence supporting Maryland's proof of claim for unrelated taxes."). The Fourth Circuit also acknowledged that, notwithstanding its dicta on the constitutionality of § 106(b), that provision "may correctly describe those actions that, as a matter of constitutional law, constitute a waiver of the Eleventh Amendment." See id. at 1147.

consistency of section 106(b)'s elements for waiver with pre-existing case law. Respondents disagree with Georgia's suggestion that these cases -- including the decision from which review is sought here -- are an untoward expansion of this Court's long-standing articulation of the scope of States' waiver in bankruptcy. In *Gardner v. New Jersey*, 329 U.S. 565 (1947), this Court noted that

> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. . . . When the State becomes the actor and files a claim against the fund, it waives any immunity it might otherwise have had respecting the adjudication of the claim.

Id. at 573-74. This confirmed this Court's earlier observation that "[i]f a state desires to participate in the assets of a bankrupt, she must submit to the appropriate requirements of the controlling authority. . . ." *New York v. Irving Trust Co.*, 288 U.S. 329, 333 (1933); see also *Clark v. Barnard*, 108 U.S. 436, 448 (1883).

Georgia's interpretation is that *Gardner* allows a State to waive its immunity only as to the disposition of the claim it files, but not as to any proceeding to enforce the bankruptcy's court's order in respect to the disposition of the claim.[3] This limiting construction is unsupported by the

[3] In this respect, at least one of the pre-*Seminole Tribe* cases Petitioner relies upon may, in fact, support Respondents' position. In *State of Ohio v. Madeline Marie Nursing Homes*, 694 F.2d 449 (6th Cir. 1982), the Sixth Circuit held that the act of filing a proof of claim did not waive Ohio's Eleventh Amendment immunity for matters unrelated to the claim. See id. at 462. As the court below noted, Pet. App. 14, and as Respondents suggest here, an action to enforce the bankruptcy court's discharge injunction and automatic stay (continued...)

language of *Gardner*. More importantly, to the extent that section 106(b) may actually codify a higher threshold than *Gardner* -- by requiring (1) that a State file an actual proof of claim, (2) that the counterclaim made by the debtor be the "property of the [bankruptcy] estate," and (3) that it arise from the "same transaction or occurrence" as the State's claim -- any criticism of section 106(b) is quite unwarranted.[4]

The court below was careful to indicate that the type of proceeding to which a State's waiver was deemed to attach -- enforcement of automatic stay or discharge injunction orders in proceedings in which a State participated by filing a proof of claim -- was fully consistent with *Gardner*. *Gardner* held that the State's waiver applied to all matters "respecting the adjudication of the claim" made by the State. 329 U.S. at 574.

c. The third, and final, matter of concern is the extent of State waivers of immunity. Petitioner is right to note that various courts of appeals have, depending on the nature of cases before them, articulated rules that have had the effect of extending waivers in various directions.[5] But,

[3](...continued)
orders as against a State that participated in the adjudication of the claim (by filing a proof of claim) is certainly "related" to the claim disposition process.

[4] To the extent that Petitioner appears to be relying, see Pet. 15-17, on the principle that waivers of Eleventh Amendment immunity be unequivocally expressed, Respondents would note that this Court has never suggested that a State's actual litigation conduct can never be held as an affirmative waiver of sovereign immunity. Cf. *Wisconsin Dep't of Corrections v. Schacht*, 118 S.Ct. 2047, 2055-57 (1998) (Kennedy, J., concurring).

[5] The Seventh Circuit appears, despite the language and thrust of *Gardner*, to extend the waiver made in filing the proof of claim "only so far as necessary to adjudicate that claim." *Moragne v. Illinois Dep't of Public Aid*, 710 F.2d 1297, 1301 (7th Cir. 1983). But
(continued...)

ironically enough, the decision below presents one of the rarest, and least controversial, occasion for waivers: when a State defies the bankruptcy court's orders for automatic stays and discharge injunctions, and the debtor is compelled to initiate proceedings to make the State comply. In such circumstances, as the Eleventh Circuit held, Pet. App. 15-16, the debtor is at least entitled to recovery of the costs and attorneys' fees associated with the enforcement of the bankruptcy court's orders.

3. Respondents trust that these intimations will inform the Court's decision as to whether this matter is worthy of plenary review. If this Court is otherwise disposed to grant the Petition, there is a threshold issue that may require the Court's attention. Respondents raised below an argument that Congress had validly *abrogated* Georgia's Eleventh Amendment immunity when it legislated 11 U.S.C. § 106(a).[6] Respondents argued below that this abrogation of Eleventh Amendment immunity was unequivocally expressed by Congress, and, to the extent that it concerned enforcement of the automatic stay and discharge injunction provisions of the Bankruptcy Code, 11 U.S.C. §§ 362 & 524, was enacted pursuant to the Due Process and Privileges or Immunities Clauses of the Fourteenth Amendment.

This argument was accepted by both the Bankruptcy

[5](...continued)
this opinion may well have been overruled sub-silentio by *In re Platter*, 140 F.3d 676, 679-80 (7th Cir. 1998). The Fourth Circuit, in *In re Creative Goldsmiths*, adhered to a compulsory counterclaim (or "same transaction or occurrence") standard, 119 F.3d at 1149, as did the Tenth Circuit in *In re Straight*, 143 F.3d at 1391-92.

[6] 11 U.S.C. § 106(a) (1997) provides in pertinent part that "Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit . . . with respect to the following: (1) Sections . . . 362 . . . [and] 524 . . . of this title." Id.

Court, Pet. App. 32-36, 41-47, and by the District Court. Pet. App. 21-24. It was renewed before the Eleventh Circuit, see Pet. App. 8-9, but that court chose not to address it.

Whether § 106(a) was a valid abrogation of States' Eleventh Amendment immunity under the Fourteenth Amendment has been considered by a number of courts of appeals. All courts which have considered the issue have agreed that Congress unambiguously expressed an intention in 11 U.S.C. § 106(a) to abrogate the States' Eleventh Amendment immunity in a large number of bankruptcy proceedings. Yet, most of these same courts, relying on language in this Court's *Seminole Tribe* decision, 116 S.Ct. 1114, 1131-32 n.16, and the reasoning of *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), have held that § 106(a) could only have been legislated pursuant to the Bankruptcy Clause of Article I and otherwise exhibits no Fourteenth Amendment concerns. See *In re Creative Goldsmiths*, 119 F.3d at 1144-47; *In re Fernandez*, 130 F.3d 1138, 1139 (5th Cir. 1997); *In re Sacred Heart Hosp. of Norristown*, 133 F.3d 237, 243-45 (3d Cir. 1998); *In re Elias*, 218 B.R. 80, 84-86 (B.A.P. 9th Cir. 1998); *In re Lapin*, 226 B.R. 637, 644 (B.A.P. 9th Cir. 1998). Section 106(a) of the Bankruptcy Code has thus been struck-down as unconstitutional, with relatively little consideration by the lower courts.

To the extent this case is otherwise suitable for review, Respondents concur with Petitioner (see Pet. 2) that the constitutionality of 11 U.S.C. § 106(a) is properly drawn into question and may be ripe for consideration by this Court. The lower courts have simply misapprehended language in the *Seminole Tribe* and *City of Boerne* opinions by categorically ruling that federally-created due process and property rights arising in bankruptcy are not a legitimate

Fourteenth Amendment ground justifying Congress to abrogate the States' Eleventh Amendment immunity in federal bankruptcy proceedings.[7] Respondents would be prepared to argue that this Court should recognize that certain bankruptcy proceedings -- including the automatic stay of section 362 and the discharge injunction of § 524 -- are so central to the operation of the (constitutionally-mandated) uniform, federal bankruptcy system as to rise to the level of due process or privileges or immunities that Congress is entitled to protect by abrogating States' Eleventh Amendment immunity pursuant to the Fourteenth Amendment.

In any event, Respondents are clearly entitled to raise the abrogation argument as another ground for affirmance, and wish to reserve their right to do so. Nevertheless, the Court may desire to instruct the parties as to briefing on this subject, and thus to revise the Questions Presented offered by Georgia.

[7] Respondents note that the precise extent of *Seminole Tribe*'s application to federally-created property rights in patents is at issue before this Court in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S.Ct. 512 (1999) (No. 98-531) (granting review of 148 F.3d 1343 (Fed. Cir. 1998)).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

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January 21, 1999

No. 98-906

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF GEORGIA, DEPARTMENT OF REVENUE,

Petitioner,

vs.

GARY BURKE and PAMELA B. BURKE and
RAYMOND D. HEADRICK and CYNTHIA J. HEADRICK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION OF BUSINESS BANKRUPTCY LAW COMMITTEE, NEW YORK COUNTY LAWYERS' ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND BRIEF *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF

Pursuant to Rule 37.2(b) of the Rules of this Court, *amicus*, the Business Bankruptcy Law Committee (the "Committee") of the New York County Lawyers' Association (the "Association") hereby moves for leave to file the accompanying brief. Respondent has granted,[1] but Petitioner has refused to consent to the filing of the accompanying brief in this case.

The Association is an organization of approximately 9,300 members, which was founded in 1908. The Association and its committees periodically take positions on legal issues and intervene as amicus curiae in cases which are important to the public and legal profession.

The Committee has become concerned about the effect that the Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996) has had upon the practice of bankruptcy. It has filed *amicus curiae* briefs in support of the constitutionality of section 106 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, in the Third, Fifth, Tenth and Eleventh Circuit Courts of Appeals and has participated in oral argument before the Tenth and Eleventh Circuits, including the present case.

The petition filed by Georgia focuses upon the conflict among the federal circuit courts of appeals with respect to the waiver of Eleventh Amendment immunity which results from the filing of a proof of claim by a state in a bankruptcy. The Committee believes that the disarray in the case law is creating confusing precedents which undermine established Eleventh Amendment doctrines outside of bankruptcy.

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1. Respondent's letter of consent has been filed with the Clerk of the Court.

While Georgia recognizes that the instant case raises issues pertaining to the constitutionality of section 106(a) and (b) of the Bankruptcy Code, the Committee believes a fuller analysis of the question of whether Congress has the power to abrogate a state's Eleventh Amendment immunity is required. For example, a conflict between the Fifth and Seventh Circuits has arisen with respect to whether a bankruptcy court has the power to discharge a debt owing to a state, if a state has not waived its Eleventh Amendment immunity.

Although Georgia provides a substantial basis for granting a writ of certiorari in this instance, the petition does not address certain critical points. These additional points, discussed more fully in the accompanying brief, provide compelling support for the granting of a writ of certiorari. Accordingly, the Committee respectfully requests that the Court grant leave to file the accompanying brief.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of Interest	1
Summary of Argument	2
Reasons for Granting the Writ	3
I. After *Seminole Tribe* No Clear Understanding Exists On The Extent To Which States Are Subject To Bankruptcy Court Jurisdiction	3
II. This Court's Review Is Required To Eliminate The Confusing And Misleading Eleventh Amendment Precedents Being Created In Bankruptcy In The Post *Seminole Tribe* Era ..	6
III. This Court Should Decide Whether The Eleventh Amendment Bars Congress From Abrogating A State's Sovereign Immunity Pursuant To Its Powers Under The Bankruptcy Clause Or The Fourteenth Amendment	10
Conclusion	15

TABLE OF CITED AUTHORITIES

Page

Cases:

California v. Deep Sea Research, Inc., 523 U.S. 491, 118 S. Ct. 1464 (1998) 13

Carlson v. Federal Bureau of Prisons, 446 U.S. 14 (1980) 10

Clerk of Circuit Court v. NVR Homes, Inc., 222 B.R. 514 (E.D. Va. 1998) 9

Edelman v. Jordan, 415 U.S. 651 (1974) 8

Gardner v. New Jersey, 329 U.S. 565 (1947) 4, 6

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 117 S. Ct. 2028 (1997) 14

In re Barrett Refining Corp., 221 B.R. 795 (Bankr. W.D. Okla. 1998) 8

In re Christie, 222 B.R. 64 (Bankr. D N.J. 1998) 4

In re C.J. Rogers, Inc., 212 B.R. 265 (Bankr. E.D. Mich. 1997) 6

In re Creative Goldsmiths of Washington, DC Inc., 119 F.3d 1140 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998) 4, 5

In re Guiding Light Corp., 213 B.R. 489 (Bankr. E.D. La. 1997) 7, 8

Cited Authorities

	Page
In re Mitchell, 222 B.R. 877 (BAP 9th Cir. 1998)	3
In re NVR L.P., 206 B.R. 831 (Bankr. E.D. Va. 1997)	8, 9
In re Parr Meadows Racing Assoc., 880 F.2d 1540, 1545 (2d Cir. 1989), *cert. denied, sub nom., Suffolk County Treasurer v. Barr*, 493 U.S. 1058 (1990)	11
In re Perez, 220 B.R. 216 (Bankr. D. N.J. 1998)	7
In re Platter, 140 F.3d 676 (7th Cir. 1998)	11, 14
In re Psychiatric Hosps. of Florida, Inc., 216 B.R. 660 (M.D. Fla. 1998)	8
In re Straight, 143 F.3d 1387 (10th Cir.), *cert. denied*, 119 S. Ct. 446 (1998)	4
In re Tri-City Turf Club, Inc., 203 B.R. 617 (Bankr. E.D. Ky. 1996)	4
In re Zywiczynski, 210 B.R. 924 (Bankr. W.D. N.Y. 1997)	9
Jones v. Yorke, 710 F.2d 1297 (7th Cir. 1983)	6
Maryland v. Antonelli Creditors' Liquidating Trust, 123 F.3d 777 (4th Cir. 1997)	13
Midlantic Nat'l Bank v. New Jersey Dep't Envntl. Protection, 474 U.S. 494 (1986)	11

Cited Authorities

Page

Missouri v. Fiske, 290 U.S. 18 (1933) 8, 13

New York v. Irving Trust Co., 288 U.S. 329 (1933) ... 12

Ohio v. Madeline Nursing Homes, 694 F.2d 449 (6th Cir. 1982) 6

Perez v. Campbell, 402 U.S. 637 (1971) 7

Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S. Ct. 1114 (1996) ..... *passim*

Texas v. Walker, 142 F.3d 813 (5th Cir. 1998), *cert. denied, sub. nom, Walker v. Texas*, 1999 U.S. Lexis 573 (U.S. Jan. 19, 1999) 6, 7, 11, 13

Toucey v. New York Life Insurance Co., 314 U.S. 118 (1941) 14

United States v. Nordic Village Inc., 503 U.S. 30 (1992) 13

United States v. Williams, 504 U.S. 36 (1992) 10

Wisconsin Dept. of Corrections v. Schacht, __ U.S. __, 118 S. Ct. 2047 (1998) 12

Cited Authorities

Page

Statutes:

11 U.S.C. § 101 *et seq.* ..... *passim*

11 U.S.C. § 362(a) 11

11 U.S.C. § 1146(c) 8, 9

United States Constitution:

Article I, § 8, cl. 4 10

Eleventh Amendment ..... *passim*

Fourteenth Amendment 10

Other Authority:

"State Bankruptcy Survey Results," 29 *Bankruptcy Court Decisions* 21 at 1 (November 19, 1996) 3

STATEMENT OF INTEREST

The New York County Lawyers' Association (the "Association") is an organization of approximately 9,300 members, which was founded in 1908. The Association and its committees periodically take positions on legal issues and intervene as amicus curiae in cases which are important to the public and legal profession.

The Business Bankruptcy Law Committee of the Association (the "Committee") has become concerned about the effect that the Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996) has had upon the practice of bankruptcy. It has filed *amicus curiae* briefs in support of the constitutionality of section 106 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, in the Third, Fifth, Tenth and Eleventh Circuit Courts of Appeals and has participated in oral argument before the Tenth and Eleventh Circuits, including the present case.

In order to avoid major problems in the practice of bankruptcy, the Committee believes that the constitutionality of section 106 of the Bankruptcy Code and related Eleventh Amendment issues need to be addressed by this Court. This brief is submitted in support of the petition for a writ of certiorari filed by the State of Georgia, Department of Revenue ("Georgia").[1]

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1. Counsel for a party did not author the brief in whole or in part, and no person or entity other than the Committee, its members or its counsel, have made a monetary contribution to the preparation or submission of this brief. While the Committee's position on the merits of this case may benefit the Respondent, the Committee has no stake in the recovery that any party may receive in connection with the case.

SUMMARY OF ARGUMENT

Georgia is asking this Court to resolve a conflict among the federal circuit courts of appeals with respect to the extent to which a state's sovereign immunity is waived by the filing of a proof of claim in bankruptcy. Congress has defined this waiver in section 106(b) of the Bankruptcy Code.

Congress traditionally has undertaken the delicate task of balancing the competing interests represented by a state's sovereign immunity and the need to administer all of a debtor's assets and liabilities in a centralized proceeding. This Court's opinion in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996) has undermined the authority of Congress in this area, and the Court's decades old decisions involving the adjudication of a state's claim in bankruptcy fail to provide a clear guide. The resulting dangers are reflected not only in the differences among the federal circuit courts of appeals, but also in opinions by courts on all levels, which often reconcile the inherent conflict between Eleventh Amendment immunity and the collective nature of a bankruptcy with rulings which undermine established Eleventh Amendment doctrines.

In addition to considering the constitutionality of the waiver of state sovereign immunity provided in section 106(b) of the Bankruptcy Code, also fully briefed and argued before the Eleventh Circuit was the issue of Congress's power to abrogate a state's Eleventh Amendment immunity in section 106(a). These two issues are inextricably linked, because if Congress has the power to abrogate Eleventh Amendment immunity, less reliance upon the doctrine of waiver is required in order to preserve the orderly operation of the bankruptcy system.

The collective nature of a bankruptcy distinguishes the issues in the decision below from other Eleventh Amendment controversies. By examining the issue of waiver in the instant case the Court can answer the essential question of what Eleventh Amendment rights are relinquished by a state when a proof of claim is filed. In addressing this question, the Court can determine whether waiver is even a factor, or whether Congress has the power to abrogate a state's Eleventh Amendment immunity in matters involving a violation of the Bankruptcy Code's automatic stay or discharge injunction.

REASONS FOR GRANTING THE WRIT

I.

AFTER *SEMINOLE TRIBE* NO CLEAR UNDERSTANDING EXISTS ON THE EXTENT TO WHICH STATES ARE SUBJECT TO BANKRUPTCY COURT JURISDICTION

In 1996 this Court ruled in *Seminole Tribe* that Congress lacked the power under the Commerce Clause in Article I of the Constitution to abrogate a state's Eleventh Amendment immunity. In a footnote, the *Seminole Tribe* Court stated that this same principle was applicable in bankruptcy, but provided no detailed discussion of the issue. *Seminole Tribe*, 116 S. Ct. at 1131 n.16. Thus, a void was created, which the lower courts have been unable to fill.

States are among the most significant parties in bankruptcy. *See* "State Bankruptcy Survey Results," 29 *Bankruptcy Court Decisions* 21 at 1 (November 19, 1996). However, following this Court's decision in *Seminole Tribe*, lower courts routinely have ruled that the Eleventh Amendment bars a bankruptcy court from asserting jurisdiction over a state in the absence of a state's filing of a proof of claim. *See, e.g., In re Mitchell*, 222

B.R. 877 (BAP 9th Cir. 1998) (bankruptcy court lacks jurisdiction to determine dischargeability of state income tax debt); *In re Christie*, 222 B.R. 64 (Bankr. D N.J. 1998) (bankruptcy court must vacate prior order voiding state's lien on debtor's exempt property, as no proof of claim filed); *In re Tri-City Turf Club, Inc.*, 203 B.R. 617 (Bankr. E.D. Ky. 1996) (bankruptcy court lacks jurisdiction over action to enjoin state agency from revoking debtor's license in violation of automatic stay). The filing of a proof of claim has become a prerequisite for establishing a bankruptcy court's jurisdiction over a state.

The waiver of Eleventh Amendment immunity triggered by the filing of a proof of claim was recognized by this Court more than half a century ago in *Gardner v. New Jersey*, 329 U.S. 565 (1947). The opinion in *Gardner*, however, does not clearly delineate the extent of that waiver. Prior to this Court's opinion in *Seminole Tribe*, Congress shouldered that burden. Now, as described in the Petition, major conflicts have arisen among the federal circuit courts of appeals regarding the consequences which arise from the filing of a proof of claim by a state in bankruptcy.

Central to these differing interpretations are the underlying constitutional questions of the extent to which the filing of a proof of claim constitutes a waiver of Eleventh Amendment immunity and the ability of Congress to define the extent of that waiver. As described by Georgia, the Tenth Circuit in *In re Straight*, 143 F.3d 1387 (10th Cir.), *cert. denied*, 119 S. Ct. 446 (1998) upheld the constitutionality of Congress's definition of the degree of waiver provided in section 106(b) of the Bankruptcy Code. Pet. 10. In contrast, the Fourth Circuit in *In re Creative Goldsmiths of Washington, DC Inc.*, 119 F.3d 1140 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998) found that under the rule established by this Court in *Seminole Tribe*, Congress's attempt to define waiver in section 106(b) constituted an unconstitutional attempt to abrogate Eleventh Amendment immunity.

The Fourth Circuit, nevertheless, did not deny that some form of waiver was created by the filing of a proof of claim. Instead, it ruled that the filing of a proof of claim subjects a state to suit for a compulsory counterclaim arising from the same transaction which is the subject of a state's proof of claim. However, absent from the *Creative Goldsmiths* opinion is any real justification for why the assertion of a compulsory counterclaim against a state does not violate the Eleventh Amendment. The *Creative Goldsmiths* court simply reasoned that:

> [I]t would violate the fundamental fairness of judicial process to allow a state to proceed in federal court and at the same time strip the defendant of valid defenses because they might be construed to be affirmative claims against the state.

Id. at 1148. Nowhere in the opinion does the Fourth Circuit explain how a bankruptcy court's equitable powers may supersede the dictates of the Eleventh Amendment.

The Eleventh Circuit in the opinion below adopted an alternative strategy in analyzing the consequences of the filing of a proof of claim by a state in bankruptcy. The court below declined to rely upon the definition of waiver in section 106(b) given this Court's opinion in *Seminole Tribe*, Pet. App. 9 n.8; nor was it willing to accept the compulsory counterclaim rule as a measure for defining a waiver of Eleventh Amendment immunity. *Id.* at 16 n.13. Instead, the Eleventh Circuit ruled that where a debtor's claims against a state involve the same taxes as are the subject of a state's proof of claim, and where the recovery sought is limited to costs and attorneys' fees, a bankruptcy court's resolution of the claim falls "easily within the waiver of immunity" established in *Gardner*. *Id.* at 15. However, the court below failed to provide any definition of the extent of that waiver.

Underlying the opinions in *Straight*, *Creative Goldsmiths* and the decision below is the understanding that under the rule set forth by this Court in *Gardner*, when a state files a proof of claim, it subjects itself to the jurisdiction of a bankruptcy court. Prior to this Court's opinion in *Seminole Tribe*, the universally accepted limits of that jurisdiction were defined by Congress in the Bankruptcy Code.[2] However, as *Seminole Tribe* has undermined the authority of Congress to define those limits, the federal circuit courts of appeals now require the guidance of this Court in defining this very delicate balance in state and federal power.

II.

THIS COURT'S REVIEW IS REQUIRED TO ELIMINATE THE CONFUSING AND MISLEADING ELEVENTH AMENDMENT PRECEDENTS BEING CREATED IN BANKRUPTCY IN THE POST *SEMINOLE TRIBE* ERA

Following the opinion in *Seminole Tribe*, numerous courts have recognized the basic conflict between *Seminole Tribe's* broad application of the Eleventh Amendment and "the policy imperatives of federal bankruptcy law." *In re C.J. Rogers, Inc.*, 212 B.R. 265, 276, n. 5 (Bankr. E.D. Mich. 1997). Some courts have asserted continued bankruptcy court jurisdiction over a state in ways which violate basic Eleventh Amendment doctrines.

For example, in *Texas v. Walker*, 142 F.3d 813 (5th Cir. 1998), *cert. denied, sub. nom, Walker v. Texas*, 1999 U.S. Lexis

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2. The two earlier cases discussed in the Petition - *Jones v. Yorke*, 710 F.2d 1297 (7th Cir. 1983) and *Ohio v. Madeline Nursing Homes*, 694 F.2d 449 (6th Cir. 1982), *see* Pet. 7-9, were cases under the Bankruptcy Act, which contained no provision addressing the sovereign immunity of a state.

573 (U.S. Jan. 19, 1999) the Fifth Circuit Court of Appeals ruled that the discharge of a debt to a state did not violate the Eleventh Amendment, because it is a state's choice whether to participate in a bankruptcy, while a bankruptcy court possesses the authority to issue an order discharging a debt "by virtue of the Supremacy Clause." *Id.* at 822. The fallacy in that reasoning is that the constitutionality of any act of Congress could withstand an Eleventh Amendment challenge, if the Supremacy Clause were an adequate shield against such an attack.[3]

Similar problems have arisen in bankruptcy from an overly broad application of the *Ex parte Young* exception to Eleventh Amendment immunity. For example, in *In re Guiding Light Corp.*, 213 B.R. 489 (Bankr. E.D. La. 1997) the bankruptcy court refused to dismiss a suit brought against the head of the Louisiana Department of Health and Hospitals for wrongfully withholding post-petition payments owing to a debtor. The *Guiding Light* court refused to dismiss the suit, because one of

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3. This is not to suggest that Supremacy Clause issues are not implicated in Eleventh Amendment controversies arising in bankruptcy. For example, in one of this Court's seminal Supremacy Clause opinions, *Perez v. Campbell*, 402 U.S. 637 (1971), it was determined that a state could not condition the restoration of an uninsured debtor's driver's license upon his payment of a judgment arising from an auto accident. Although the *Perez* Court recognized that a state had a legitimate police power interest in maintaining highway safety, it ruled that the Supremacy Clause barred a state from not giving full effect to a debtor's discharge in bankruptcy. In contrast, *Seminole Tribe* was interpreted in *In re Perez*, 220 B.R. 216 (Bankr. D. N.J. 1998) to mean that a bankruptcy court lacks the power to order the restoration of a debtor's driver's license (and even to prevent the debtor's incarceration by a municipal judge), because of a failure to pay pre-petition parking tickets, notwithstanding the fact that those debts were being paid under a confirmed chapter 13 plan. This recent *Perez* opinion demonstrates the confusion and threat to comity arising in recent Eleventh Amendment controversies in bankruptcy.

the counts was framed as a request for an order prohibiting the department head from exercising continued control over previously withheld funds. *Id.* at 492. Such a ruling obviously goes beyond the *Ex parte Young* exception allowing for prospective relief, as the suit remained an action seeking direct payment from the state treasury. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 664-671 (1974).

This Court has ruled that actions for any form of relief against a state fall within the purview of the Eleventh Amendment. *See Missouri v. Fiske*, 290 U.S. 18, 28 (1933). Yet, in *In re Barrett Refining Corp.*, 221 B.R. 795, 807-808 (Bankr. W.D. Okla. 1998), the bankruptcy court ruled that the Eleventh Amendment was inapplicable in bankruptcy. The *Barrett* court concluded that bankruptcy cases were not suits within the meaning of the Eleventh Amendment, as no affirmative recovery was being sought by a debtor against a state. *Id.* at 807-808. Similarly, in *In re Psychiatric Hosps. of Florida, Inc.*, 216 B.R. 660 (M.D. Fla. 1998), the district court ruled that a motion by a debtor to determine its tax liability to a state was not a suit within the meaning of the Eleventh Amendment.

The clash between the Eleventh Amendment and the operation of the bankruptcy system is clearly illustrated by the decisions in the NVR Homes bankruptcy. In *In re NVR L.P.*, 206 B.R. 831 (Bankr. E.D. Va. 1997) the issue was whether the transfer tax exemption provided by section 1146(c) of the Bankruptcy Code was applicable to various transfers of property made by chapter 11 debtors pursuant to their jointly consolidated plan of reorganization. The *NVR* court ruled that *Seminole Tribe* barred it from even issuing a declaratory judgment with respect to whether the Bankruptcy Code exemption applied. It further warned of the dire consequences that the application of the *Seminole Tribe* doctrine would have in bankruptcy. The *NVR* court observed:

> [A] potentially irreconcilable conflict . . . may now exist between the Bankruptcy Clause and the Eleventh Amendment. Our national bankruptcy system, in which Congress intends debtors to retain the opportunity to reorganize and to obtain a fresh start, may be in grave danger if the states cannot be bound by orders issued by the federal courts under bankruptcy law.

Id. at 843 n. 25. On appeal, the district court found a way to remedy this threat to the operation of the bankruptcy law. In *Clerk of Circuit Court v. NVR Homes, Inc.*, 222 B.R. 514, 520-521 (E.D. Va. 1998), the district court ruled that an action by a debtor seeking a declaration of whether a section 1146(c) tax exemption applied was not the type of suit which fell within the scope of the Eleventh Amendment. Obviously, no declaratory judgment exception to the Eleventh Amendment exists. Such tortured results reflect the type of precedent being created by courts on all levels to protect the operation of the bankruptcy system.

After struggling with the inherent conflicts between the collective nature of a bankruptcy and the ability of a state to frustrate that process by the assertion of its enhanced Eleventh Amendment immunity, one bankruptcy judge concluded:

> Those who have devoted their professional lives and skills to federal law (and those whose jobs depend on the reorganizations and other activities, that the process contemplates) are anxious for instruction about what is Constitutionally permissible.

In re Zywiczynski, 210 B.R. 924, 933-934 (Bankr. W.D. N.Y. 1997). Almost three years have passed since this Court described in dicta that Congress lacks the power to abrogate a state's Eleventh Amendment immunity in bankruptcy; yet, the lower courts still lack the necessary guidance in understanding

the constitutional limits on a state's participation in the bankruptcy process. This uncertainly is breeding a confused set of precedents, which threaten to cloud the application of Eleventh Amendment doctrines in other areas of the law.

III.

THIS COURT SHOULD DECIDE WHETHER THE ELEVENTH AMENDMENT BARS CONGRESS FROM ABROGATING A STATE'S SOVEREIGN IMMUNITY PURSUANT TO ITS POWERS UNDER THE BANKRUPTCY CLAUSE OR THE FOURTEENTH AMENDMENT

Underlying the confusing Eleventh Amendment precedents arising in bankruptcy is the inability of a collective process to operate properly, where a critical participant, a state, can exclude itself by asserting its Eleventh Amendment immunity.

The issue of whether Congress has the power to abrogate a state's Eleventh Amendment immunity was decided by the bankruptcy court and district court below, and was fully briefed and argued before the Eleventh Circuit.[4] Thus, ripe for decision is the question of whether Congress has the right to abrogate a state's Eleventh Amendment immunity. *See United States v. Williams*, 504 U.S. 36, 41 (1992); *see also Carlson v. Federal Bureau of Prisons*, 446 U.S. 14, 17 n.2 (1980) (Court may decide questions not raised below in the interest of judicial administration).

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4. The bankruptcy and district courts ruled that the abrogation of sovereign immunity in section 106 of the Bankruptcy Code reflected an exercise of Congress's power under the Fourteenth Amendment, the position advocated by the Respondent. The Committee argued before the Eleventh Circuit that the power to abrogate a state's sovereign immunity was inherent in the Bankruptcy Clause. U.S. Const., art. I, § 8, cl. 4.

Georgia is seeking a reversal of the lower court's order for costs and attorney's fees arising from the state's violation of a bankruptcy court's order discharging a debt and the automatic stay, an injunction arising upon the filing of a petition in bankruptcy. The automatic stay is recognized as a fundamental protection provided by the Bankruptcy Code. 11 U.S.C. § 362(a). *See Midlantic Nat'l Bank v. New Jersey Dep't Envntl. Protection*, 474 U.S. 494, 503 (1986). It furthers the basic bankruptcy policy of providing an equal distribution of a debtor's assets among its creditors by enjoining all entities from taking any action against a debtor to collect a pre-petition debt. *In re Parr Meadows Racing Assoc.*, 880 F.2d 1540, 1545 (2d Cir. 1989), *cert. denied, sub nom., Suffolk County Treasurer v. Barr*, 493 U.S. 1058 (1990). Thus, when a state's sovereign immunity is successfully asserted to bar enforcement of the automatic stay, more than the rights of a single debtor are affected. The rights of all of a debtor's creditors are altered.

In considering the issues raised by the decision below, this Court also will be able to resolve an Eleventh Amendment conflict between federal circuit courts of appeals with respect to a bankruptcy court's ability to discharge a debt owing to a state. As previously discussed, in *Texas v. Walker*, the Fifth Circuit ruled that the power of a bankruptcy court to discharge a debt was not dependent upon a state's filing of a proof of claim. *Walker*, 142 F.3d at 822-823. In contrast, in *In re Platter*, 140 F.3d 676 (7th Cir. 1998) the Seventh Circuit reasoned that a bankruptcy court's authority to discharge a debt was contingent upon a state's filing of a proof of claim or an equivalent action. Thus, in matters involving a state, there is a conflict in the federal circuit courts of appeals with respect to whether a bankruptcy court has the power to exercise one of its primary functions — the discharge of a debt.

Prior to this Court's opinion in *Seminole Tribe*, such basic constitutional questions involving the Eleventh Amendment and bankruptcy did not require a precise definition. For example, this Court ruled in *New York v. Irving Trust Co.*, 288 U.S. 329 (1933) that sovereign immunity did not bar a state from being subject to a bankruptcy court's order limiting the time within which a claim against a debtor could be filed. However, the *Irving Trust* Court relied simply upon the need for the "orderly" operation of the bankruptcy process. *Id.* at 333; no attempt was made to describe how a state could be subjected to a bankruptcy court's order absent the filing of a proof of claim. This Court's opinion in *Seminole Tribe* now imposes a much more exacting Eleventh Amendment test upon challenges to a state's sovereign immunity in bankruptcy, a test for which the Court's prior opinions fail to provide clear parameters.

Since its opinion in *Seminole Tribe*, this Court has shown a willingness to consider Eleventh Amendment questions comparable to the issues presented in the instant case. For example, in its recent decision in *Wisconsin Dept. of Corrections v. Schacht*, __ U.S. __, 118 S. Ct. 2047 (1998), this Court refused to accept a previously recognized broad application of Eleventh Amendment immunity requiring the dismissal of a case removed by a state to federal court after the claims against the state are dismissed on Eleventh Amendment grounds, notwithstanding the existence of nonbarred claims for relief against individual defendants. Justice Kennedy stated in his concurring opinion in *Schacht* that the Court should consider in some later case whether a state waived its Eleventh Amendment immunity by choosing to remove a case to federal court. *Id.* at 2055-2057. He recognized that such an action by a state was akin to the filing of a proof of claim in bankruptcy. *Id.* at 2056.

Even more significant was this Court's recognition of an in rem exception to Eleventh Amendment immunity in admiralty cases in *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 118 S. Ct. 1464 (1998). Under the former Bankruptcy Act, a bankruptcy court's jurisdiction over the property of a debtor was used to define the court's jurisdiction to decide a controversy.

Several federal circuit courts of appeals appear to have implicitly recognized an in rem exception to Eleventh Amendment immunity in bankruptcy. For example, in *Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777 (4th Cir. 1997), the Fourth Circuit found that a state was bound by the transfer tax exemption provided in an order confirming a chapter 11 plan. The *Antonelli* court responded to an Eleventh Amendment challenge by claiming that the power to issue a confirmation order was derived from the bankruptcy court's jurisdiction over the debtor and its estate, "not from jurisdiction over the state." *Id.* at 787. The distinctive position a bankruptcy court holds because of its jurisdiction over the property of a debtor also was recognized by the Fifth Circuit Court of Appeals in *Walker*, 142 F.3d at 822.

Neither of these circuit courts of appeals would explicitly recognize the existence of an in rem exception to Eleventh Amendment immunity in bankruptcy, given this Court's broad statement of principle in *Seminole Tribe*, and its prior rulings in *United States v. Nordic Village Inc.*, 503 U.S. 30, 39 (1992) (no in rem exception exists to sovereign immunity bar against monetary recovery) and *Fiske*, 290 U.S. at 28 (no in rem exception to Eleventh Amendment immunity exists). Thus, by addressing the Eleventh Amendment abrogation issue in the instant case, this Court can provide direction to the lower courts in matters involving the automatic stay, the discharging of a debtor's liabilities, and other orders whose collective nature is

the particular province of bankruptcy. It is apparent that some type of abrogation of sovereign immunity is required; otherwise, as reflected in the Seventh Circuit's opinion in *Platter*, essential bankruptcy court orders would be ineffective against a state which had not waived its Eleventh Amendment immunity.

In *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S. Ct. 2028 (1997), this Court recognized that the resolution of Eleventh Amendment controversies may involve a balancing of interests. *Id.* at 2038. Such an approach is consistent with this Court's past recognition of "the delicate adjustments required by our federalism." *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 141 (1941). A conflict already has arisen between the Fifth and Seventh Circuits with respect to whether the Eleventh Amendment bars a bankruptcy court from discharging a debt owed to a state. After *Seminole Tribe*, only this Court has the authority to give direction to the lower courts in striking the delicate balance which must be established in resolving the inherent conflict between a state's Eleventh Amendment rights and the federal bankruptcy power.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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